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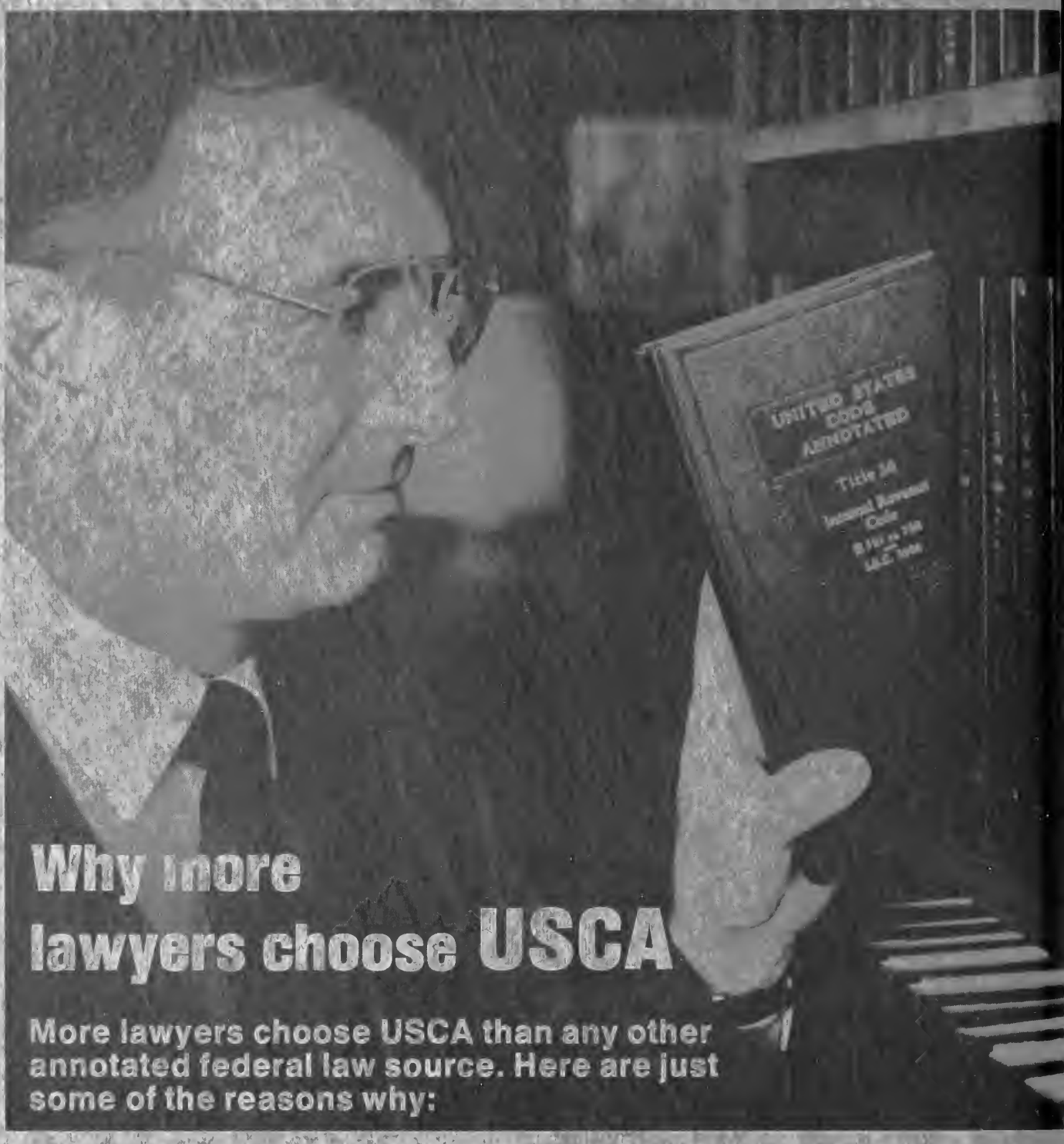

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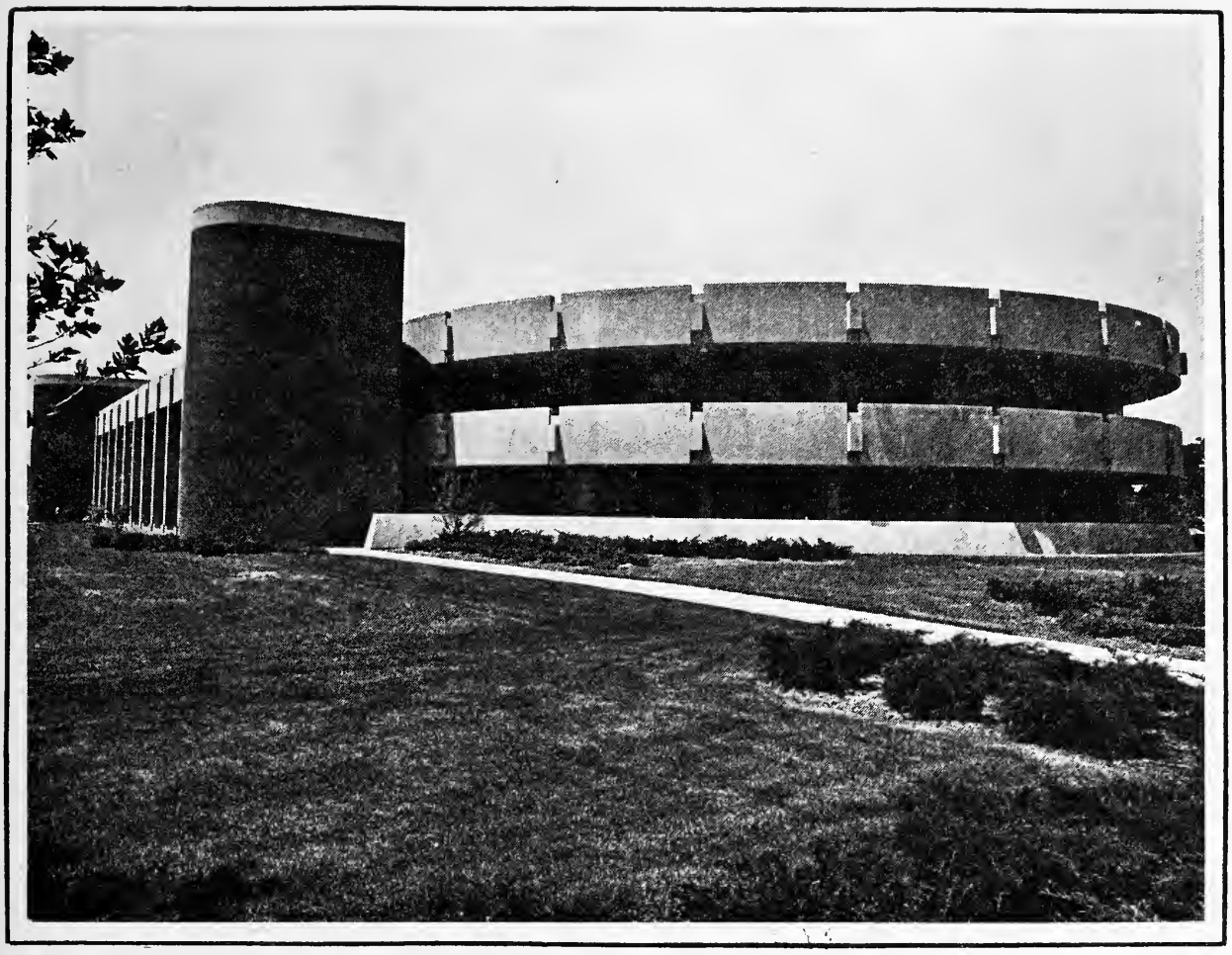

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Releasing Excellence: Erasing Gender Zoning From The Legal Mind

Sallyanne Payton*

Conferences such as this one always remind me of how dramatically the world has changed for women in the law over the past twenty or so years. When I entered Stanford in the fall of 1965, there were ten women in our class of roughly one hundred sixty; the admission of such an unprecedented number of women, we were told on arrival, had been greeted with disapproval by a number of faculty members. Nearly twenty years later, the classes at most metropolitan area law schools are half female; women lawyers are moving up within the profession; and law has become a profession of choice, perhaps *the* profession of choice, for able young women.

At this juncture, the question is not whether women will have a decisive impact on the legal profession, but what they will make of their opportunities. This is what I want to talk about today: what difference can these new women lawyers make, for themselves, for the profession, for women as a class? I say "new" lawyers in order to emphasize the fact that women did not begin to apply in large numbers for admission to law school until the late 1960's and early 1970's. The presence of a substantial female presence in the profession is a recent occurrence, and conseqeuently, the vanguard of women has only within the past few years begun to reach the partnership level in law firms or positions of seniority in the public sector. But the process is inexorable — the ranks of law firm associates are full of women, as are the law schools, as are the law school admissions office files. So the question is not whether something momentous is occurring but what the momentous occurrence will turn out to be.

I think it fair to say that very few people would have predicted, before the actual event, how congenial as an enterprise women would

*Professor of Law, University of Michigan Law School, B.A., 1964; LL.B., 1968, Stanford University. This address was presented November 11, 1984, at the "Women and the Law Conference" at Indiana University School of Law — Indianapolis. The author would like to thank Patricia D. White for helpful comments on the published version of this address.

find the study of law, how well they would do at it, and how rapidly the meritocratic elite of the profession would absorb, in accordance with what rapidly became nearly gender-blind hiring policies, the women emerging from law schools. I can appreciate that there may still be substantial barriers to the entry and advancement of women in the less cosmopolitan areas of the country; but in the major metropolitan areas one need fear no longer, I am told, the forms of outright misogyny that were still common as recently as a decade ago. I am not suggesting that discrimination on account of sex does not persist in subtle form, only that the transition from explicit exclusion to pervasive inclusion, even on somewhat less rewarding terms than those ordinarily accorded to men, has been accomplished with a speed and grace that few would have thought possible. Most intriguingly, law may be the only male-dominated profession in which this has occurred. Women in medicine have reported greater difficulties, and women entering the business world have not thus far achieved anything like the numerical presence or professional visibility of women in the law.

Why has this occurred? Probably not because male lawyers are nice men who want greater diversity in the profession, though many of them are and do. The truer pull is that of competitive reality: women succeeded in law school, which means that they had talent as measured by the customary meritocratic standards of legal academia. It would have been inconsistent with the meritocratic ethos of the profession, as well as economically irrational, for law firms to have preferred less talented males to more talented able females, particularly when law firms are trying to hire the best available brains to do legal thinking and writing in a competitive environment. An act of discrimination may come back to haunt it if its competitor hires the more capable person and uses her against the firm. I would argue that the combination of meritocracy and competition in law has been to women's benefit.

So women stepped out of law school into jobs because they could do the work, and firms could not afford not to have them. This observation only pushes the question back one step further. Why is it that law work proved congenial? It was not supposed to have been. Prior to the time when women started coming to law school, the law, considered as an intellectual discipline, was considered quintessentially masculine. The mental skills involved in doing law work were thought to center on logic, rationality, and precision. High praise for a lawyer or judge was to be called "toughminded." Litigation was combat. The ends of the law were described as law, order, justice — masculine goals the achievement of which required the use of force. While it was never quite suggested that other mental qualities were missing from the world of law — the existence of "equity" and the central role of the jury in factfinding being constant reminders that there was more to law than rule application — it was made quite clear that the lawyer himself (there was no herself in this picture) was to be the smart, tough Hessian, necessarily male.

Experience with women in law school uncovered the fallacy in this view of the world. The fallacy is of a prevalent type — that is, when one has always seen characteristics A, B, and C in combination with characteristic P, one may think that P is part of A, B, and C, or necessary to them. One of the purposes of blind grading, letting A, B, and C stand for an ability to reason and argue, and P stand for the characteristic of being male, is to ensure that a professor who is looking for A, B, and C is not confused by the presence or absence of P. Blind grading revealed that women as a class could do just as well as men as a class in law school — that is that whatever characteristics A, B, and C that law professors were testing for were not correlated with P. This was a revelation.

Revelations continued to pour in. It turned out that just as women had been good law students they became good lawyers. The true tests were in the courtroom, the scene of what had been thought to be a gladiatorial combat. Women did fine as trial lawyers, and not just as softhearted defense counsel but as prosecutors. Women also did fine as tax lawyers and antitrust lawyers, two fields also that had had masculine images. Within a matter of a few years, there was virtually no field of the law in which the mythology of female intellectual incompetence and personal incapacity had not been dispelled.

In the process, a good many male perceptions have changed, and so have a good many male biographies. Male lawyers now have women lawyers as friends, colleagues, and superiors. Some of them have women lawyers, or other women professionals, as spouses. And now they can have aspirations for their daughters, even be able to see them perhaps as their successors. That is real change. Of course the change is largely confined to the environment of the elite, but that should not make us denigrate its importance. The male lawyers who are accommodating the presence of women in their professional lives are the males who determine, in the course of deciding what the law is, what other males should be required to do in order to accommodate the females coming into *their* environments. Let me share with you an illustrative story. Just a few months ago, a proudly conservative male lawyer from a midwestern city mentioned to me that one of his current tasks in administering his law firm was to figure out how to make it possible for the tax partner to bring her newborn child to the office in order to breast-feed it. He was anxious to accommodate her because she was enormously respected withing the legal community and had several offers from competing firms. Moreover, his attitude was not resentful, but supportive. That lawyer may be less than fully sympathetic to the male business executive who does not see the need to adjust his own historic practices to accommodate his women colleagues and employees. The lawyer may even be able to give the businessman some helpful advice about how to do it. Large changes come from just such conversations about small matters.

There is one more general beneficial effect of having women in the

law that I would like to mention. That is that the executive class of American society, in both the private and public sectors, is becoming accustomed to taking its legal advice from women. That means that male executives are acquiring the habit of accepting, deferring to, and paying high fees for, the advice of women on matters that are crucial to their own ability to succeed. It is hard to believe that there is not a positive spillover effect onto women entering other professional areas from the fact that women have done so well so visibly in law.

This kind of change is of course gradual, not revolutionary; and its cumulative effect can only be perceived as people move through the pipeline bringing with them experiences and expectations shaped by the worlds of the 1970's and 1980's rather than those of the 1940's and 1950's. What is important to see is that women are not dropping out of the pipeline; they are advancing, more or less in accordance with expectation, into senior positions in those professional institutions that pride themselves on being, roughly speaking, meritocratic. That is not to say that females do not still face difficulties: the cohort of women entering practice now will still suffer the burden of being pioneers, and the culture still systematically undervalues whatever work women do. But the legal profession is the vanguard of integrating women into a formerly male workforce, and lawyers are collectively as thoughtful and open-minded a group of males as exist in our society. If I had a daughter, I would encourage her to go to law school.

I would, moreover, try to convince my hypothetical daughter that she is part of a great moment in history. This epoch marks the first time that it has been positively good to be female, the first time that women have been able to aspire to the full range of opportunities and rewards available within the society. It is even a time when it is good to be a black woman, at least of the middle class, which is truly a dramatic change. And I would argue that the ascent of women into professional, technical, and managerial elites will bring in its train a shift upward in the evaluation of numerous attributes, chiefly clustered around listening and nurturing, that in the dominant culture are associated with femaleness. This shift is already visibly in the making, and we can expect to see it accelerate as the number of women in positions of some kind of authority reaches a critical mass. It is happily the case that lawyers and the lawyering function are in the forefront of this shift of perception. Let me first talk briefly about the idea of gender that has historically prevailed in the dominant culture, then discuss the lawmaking function in terms of gender typing.

While the physical differences between men and women are biologically standardized, gender differences — that is, the patterns of comprehensive role differentiation between men and women, which affect their respective activities in childbearing, work, religion, governance, and so on — are social constructions that vary from society to society. Gender roles have to be learned; one must learn the social significance of one's body type and the behaviors that are socially approved for persons of

that body type. Moreover, the rules have to be enforced; an untold amount of early socialization goes into instilling and enforcing gender role differentiation in the young.

In the dominant culture of the contemporary West, the gender line has been fixed in such a way that some attributes of mind and character have been regarded as intrinsically female, and therefore are taught to and reinforced in females, and some are regarded as intrinsically male, and therefore are taught to and reinforced in males. You know the list as well as I. Males are thought and taught to be rational, females emotional. Males are thought to be logical, females intuitive. In terms of character, males are supposed to be dominant and aggressive, females passive and submissive. Males are supposed to be authoritative, females deferential. Males embody the virtues of individualism, females of community and connectedness. Males are hard and dispassionate, females sensitive and compassionate, and so forth. This is what I like to call mental gender "zoning": the culture tends to enforce certain uses of some minds and other uses of others, and historically has punished those who have violated the protocols.

Because I am not a product of the dominant culture, I am frequently startled to encounter the dominant culture's zoning practices, and am not at all inclined to abide by them. A bit of autobiography may be in order here, just to place the problem of gender zoning in a larger context. During the period from roughly the mid-1950's, when *Brown v. Board of Education* launched the drive for racial desegregation, until the passage of the major federal civil rights legislation in the mid-1960's, the nation debated, out loud, the terms on which black people, or "Negroes" as we were then called, were to be allowed to do such ordinary things as eat in restaurants, go to school, have jobs, buy houses, and vote. Among the strongest voices in the debate were those of Southern whites, who tried to explain to the Northerners that Negroes were not yet ready for full citizenship, being dependent, passive, affectionate, irresponsible, and emotional. Our most striking characteristics were said to be our capacity for affection and loyalty (these remarks were generally accompanied by references to family servants) and our childlike delight in things sensual and musical (this was before the Watts riot). What we needed was to be under the paternal guidance of our best friends, the good white people of the South.

You may remember the general derision that greeted the expression of antebellum views such as these, particularly when they were accompanied by the televised spectacle of Southern blacks in peaceful and prayerful resistance being beaten, cattleprodded, and firehosed by Southern sheriffs and their men. The argument in favor of the racial zoning practices of the South was answered, after much struggle, with the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

With these expressions of national consensus safely tucked under my psychic belt, I entered the Stanford Law School in the fall of 1965. There, sitting in my law school classes, I learned for the first time that

women were dependent, passive, affectionate, irresponsible, and incapable of thinking. That their most striking characteristics were their capacity for affection, their strong bonds to their families, their delight in things sensual and emotional. That what they needed most was to be under the sheltering guidance of their best friends, the men in their lives. All of this was crystallized in aphorisms such as "the husband and wife are one, and that one is the husband," and was enshrined in numerous common law rules that I was required to learn as truths for the purpose of supplying correct answers to law school examination questions. There were large chunks of my legal education that I could treat as pure anthropology, as my first real occasion to listen in on the messages being transmitted among males and females of the dominant culture. Unfortunately, the gender zoning system was reflected in law firm hiring practices (remember, this was 1967-68) but I escaped the worst effects of it because, as several hiring partners told me, they did not want a woman but were so happy to get a black that they would overlook the fact that I was female.

Fortunately, within the space of a few years, the women's movement began and the women in law school started to challenge the dominant culture's gender zoning practices, both by attacking the most misogynist ideologies frontally and by demonstrating through their academic performance that women's exclusion from the legal profession could not be justified on any grounds having to do with quality of mind.

Now that the cognitive dissonance has impaired the validity of the old gender division between styles of mind, what should we expect to see happen? Will the gender lines be redrawn in a different place, or will they be erased completely? Is it possible that an aptitude for thinking will become a gender-neutral characteristic like an aptitude for gardening or making music? We seem to be headed in that direction — led, by the women lawyers.

The reason is that the kind of mind required for good legal thinking has a balance of characteristics drawn from both sides of the traditional gender unity line, and reflected in legal institutions. A few moments ago we were noticing that women, socialized normally in accordance with conventional gender zoning, did well in law school right from the first. This fact is really quite suggestive. The women who went to law school in great numbers in the late 1960's and early 1970's, and who keep coming, are in no sense freaks. They are the daughters of the same families who send their sons to law school. They have been socialized into the old system of gender differentiation, and they behave mainly in accordance with conventional gender expectation, somewhat modified to suit their new roles. These women are doing fine in a profession with a style of mind asserted to be macho. Why are the women doing so well?

One answer is that aptitude for coherent thinking is not a male monopoly; females in the dominant culture have had to be taught to restrain their intellectual development in the interest of appearing to be

submissive and therefore attractive. The amount of effort that has had to be devoted to this critical piece of socialization has been a longstanding clue that the mental zoning practices in the dominant culture have been inconsistent with underlying reality, which has been straining against them. In law school, women broke through decisively.

Another answer to the question why women are doing so well in the law is that common law decisionmaking as an exercise of mind is comprehensive and therefore transcends gender zoning. The common law is not built on logic and rationality alone, but on perception, intuition, feeling, judgment. Although the legal profession has traditionally been comprised of males, and therefore has had a masculine cast and mystique, the actual mental functions of good judges and lawyers (including law professors) cannot be described in terms restricted to those on the short list of the most "masculine" habits of mind.

Consider for a moment the central event in the common law system, which is the individual litigated case. The mental image one forms immediately is of a courtroom: a judge, seated on "the bench," which is a massive, raised desk physically separated from the rest of the courtroom; a jury, perhaps, seated in an enclosure, called the "jury box"; a witness seated, testifying on the stand, which is an enclosure with a single chair in it, close to the judge; two tables facing the judge that are the opposing counsels' respective bases of operation; and behind the lawyers' tables, the spaces for the public.

What kind of institution is this? It reeks, of course, of authority — the authority of the sovereign embodied in the presiding judge to declare what the law is, the authority of the community embodied in the jury to decide the justice of the individual case, and the authority of the community to come see and hear what is transpiring in the courtroom. But it is a special type of authority. It is a kind of authority that does not speak until it is asked to speak. It is thus essentially passive. It is an authority that does not control what it will speak about, but is required to speak about everything brought to it, if only to decide that it will not speak. It is thus receptive. It is an authority that is required to listen before speaking, and its speech, when it comes, is required to be informed by what it has heard. It is thus expected to be understanding. Finally, it is an authority that has at its own command no instrument of force to carry out its will, but rather must rely on the executive officers of government to enforce the law. It is thus institutionally dependent. Passive, receptive, understanding, dependent — does this list of attributes sound familiar? The distinctive institutional characteristics of the judiciary lie on the female side of the gender zoning boundary. And it is interesting, culturally speaking, that the more active, aggressive, dominant branch — the executive — is required in our system of government to be restrained by the judicial power, to operate only "under law." Even the legislature, which is the seat of theoretical sovereignty, must yield to the judiciary's view of the Constitution.

It may also come as no surprise that this judicial institution embodies

the virtues of connectedness and many of the values of the community. The common law has historically protected expectation; it is founded on continuity; it looks for the fundamental principles that underlie the social order. The court claims to speak not in the voice of its transient personnel but with the voice of the best wisdom of the whole people. It is also worth noting, as an aside, that the visual image of the judge resonates with the underlying ideology. The judge is a robed, seated figure, an embodiment of the law whose specific human form is rendered irrelevant to the exercise of authority, which is in the law, in the institution itself. For all of its masculine mystique, the judiciary is not a macho enterprise.

Now what of the lawyer? The gladiator, the hired gun. But maybe not. Perhaps, better, the playwright, producer, director, and on-stage narrator of a theatrical presentation. Think of what the lawyer actually does. Let us take a simple scenario. The client appears in the office with a story — for example, that she took her car to a mechanic who purported to fix the brakes, for which service the client paid. As the client was driving home, a block away from the mechanic's shop, the brakes failed and the client ran into a pole. The client wants to sue the mechanic. The lawyer must decide whether the client's story can be told to a court in such a way that the court would decide in the client's favor. How does the lawyer find out what the court would do?

The lawyer looks into the books of stories that the courts have published to find those that are most similar to the one that the client is telling. If some of those stories have happy endings for persons in the client's position, then the lawyer tells the client that there is a chance of winning. If some of them have unhappy endings, the lawyer has to decide how to tell this client's story (through witnesses) in a way that makes it appear similar to the cases in which there were happy endings and unlike the cases in which the endings were unhappy. Along the way, the lawyer looks at the justifications that the judges have been giving for believing some stories rather than others, or for preferring some decisional principle over others, and tries to devise ways to tell the client's story so that the judges will find for the client. The story that will be told in court, then, is not the client's version of the story but the lawyer's version, refined to appeal to the particular audience who must be persuaded by it.

The lawyer has also to tell another kind of story, which is about the law itself. Since the common law moves forward on the individual case, disavowing any intention to bring to fruition a master plan for the development of the law, making a legal argument in a case is a connect-the-dots exercise. The dots are the "facts" of previous cases as narrated by the judges in their opinions; the connectors are the legal rules and principles that the lawyers use to explain why the dots should be connected in one way rather than another. Looking at the dots without the connectors is a little like looking up at the sky at night without the benefit of a star map; looking at the dots with the connectors is like having

a map, except that the process of litigation is one in which the two sides draw the map differently — may even position the dots in somewhat different places — and ask the court to choose. In the end, the court may position the dots itself and decide what connectors to use. I use the analogy of the star map because, although the stars are real, the map is a human construct. What, for example, does it mean to say that a star is part of the "Little Dipper," or, to change maps, that Venus is in the seventh house?

To draw out the analogy without, I hope, straining it, under the common law case method the process of deciding what the law is, as distinct from disposing of the dispute between the particular parties, is a mapping exercise in which the various mapmakers try to decide how the dot ought to be connected to the various patterns to which it might plausibly be thought to belong given the mapmaking conventions in which the courts are operating. The conventions are embodied in techniques of legal reasoning; the patterns are established by the fabric of legal doctrine. Courts must think about whether extending various possible connecting lines to the dots at issue in the particular case is possible within the logic that governs line-drawing within the system, whether such extensions are plausible given the substantive premises explicit in the particular lines considered as justificatory principles, and whether the contours of doctrine that would emerge as a result of placing the dots of the particular case in one pattern rather than another are consistent with some underlying perceived reality or legitimate aspiration, so that the map being drawn is an appropriate representation of the world that is or that is to be brought about. It is no wonder that judges find it easier to agree on the description of the location of the dot — the outcome as between the parties — than on the trajectories of the connecting lines or what the contours, or the overall pattern of the map, should be.

The lawyer who asks the court to decide a dispute makes himself (we will stick with the masculine usage for just a moment) a party to the great mapping exercise that is common law reasoning. He must show the court why the dot that is this case should be placed in a position that is favorable to his client's interests as a matter of justice in this case, and he must show the court where the doctrinal lines can be drawn that will make a decision in favor of his client consistent with the premises underlying the lines and with the logic of patternmaking in the system. He may also have to show the court that placing this dot in the particular location for which he is contending will not lead to undesirable extensions of doctrinal contours that the courts might not favor. This is no mean task, and it requires more than an ability to manipulate rule logic. Providing a legal rationale that satisfies the court's need to maintain standards of consistency and coherence is necessary, but not sufficient. The court needs to be persuaded that the law to be made, as well as the result to be reached in the particular case, is right. Indeed it may be impossible for the judge to form an opinion on the

justice of the case without deciding where this dot belongs on the map, which may require prior argument about how previous mapmakers have treated dots of this sort. The argumeent over mapping gives the judge a context, a set of alternative perspectives from which to view the dot itself.

And so the lawyer makes up a story about the law out of the previous cases, weaving together the facts and reasoning of the judges into a narrative that cries out for the next episode to be that this client wins. What gives force to this narrative about the law, as distinct from the one about the "facts," is that the narrative about the law is one about the judges themselves. The lawyer tells the judge a story about what the judge's predecessors, peers, and superiors have done in like cases — what facts and issues were presented to them, how they arrived at their mapping decisions, what their views were on the nature of the realities of situations of this type and what role the law might play in affecting or improving them, and so on. The lawyers are collectively the medium through which judges talk to one another across jurisdictions, across space, and across time.

The heart of the craft of lawyering is thus of a piece with other literary crafts. Designing legal stories and explanations may require some high-stepping logic, and it is surely necessary to know what the legal rules are in order to know what stories it is possible to tell and what principles it is possible to put forth, but the essence of the lawyer's craft is to be able to predict and influence the way in which the stories and principles are likely to be received by judge and jury. Logic, rationality, and a passion for intellectual order are essential to the lawyer's art, but the good lawyer needs as well a feel for the weight of the case, for how law and policy in an area are evolving, for how the client's story would play to a judge or jury, for how a particular judge would be likely to respond to the issue or the parties, and for a vast array of other intangible factors that enter into the management of a law case. The mental activity that is required for the practice of law demands an engagement of the whole mind, not only the preoccupation with logic that is associated by tradition with masculinity.

We have now considered the court as an institution and lawyering, or at least trial lawyering, as an intellectual art. Let us consider briefly the nature of judging. For the sake of simplicity, let us imagine a bench trial, in which the functions of trier of fact and decider of law are combined in a single individual and therefore in a single mind.

The judge is required to sit still and listen. In order to be a good judge, he must also hear. He must hear what the witnesses are saying and what they are not saying. He must decide which stories are credible, which witnesses most reliable, which versions of events are, all things considered, most plausible. He must compare the stories being told by the parties in this case with other stories told by other parties in other cases, at least as described by the judges who wrote opinions in other cases, and he must decide whether or not he agrees with the versions

of reality endorsed by those other judges. If he agrees with them, he must decide this case in a way that makes its story consistent with previous stories of the sort; if he disagrees with previous judges, he must formulate a plausible alternative view. He must decide how to classify this story in accordance with his considered view of reality and he must be able to fit his preferred story, and the reasoning that supports the result that he prefers, onto the greater legal maps being made by the cumulative efforts of thousands of other judges. In order to do this well he, too, must have a sense of the weight of the story, where it fits into his notion of the community's sense of justice and right conduct, what ordering of principles will be in accordance with the best interests and considered best judgment of the social order as he understands it.

When he has pondered the justice and the reason of the case, the judge issues an order disposing of the particular case, and he writes an essay describing the facts of the case as he finds them to be and announcing the principles upon which the case was decided. The "law" that he announces is not an order addressed to the world; it is simply an explanation. The essay goes into one of these large books of essays called case reports. It will be read as a record of an intellectual event in the life of the law — for what it says and does not say, for the most that the words describing rules and principles might be taken to mean, and for the least. The rules and principles, the justifications themselves, will be read in light of the story that the judge has recounted, which will be understood to have shaped his view of what outcomes were in accordance with justice as well as legal principle. The case will be laid beside others to see what system of rules is emerging, what stories are being told and believed, what coherence, logical and perceptual, is being created in this area of the law. The work of the judge lives as intellectual product. It will have some authority of office, but over time it will shine or wither depending upon the coherence of its vision and the soundness of its reasoning, as perceived by the judge's peers, superiors, and successors, in a process of testing and reasoning that is fundamentally gender-blind.

What does all of this mean for women coming into the law? First, although my account of the institutions and people of the law was, as you doubtless noticed, schematic and idealistic, the fact is that legal reasoning and lawyering do not require any particular mental, and certainly no physical, characteristics that are inconsistent with the basic socialization of many women. Women will continue to suffer some discomfort for some time during this period of transition, which may last another generation; and women of the dominant culture will have to develop plausible womanly styles of exercising authority and responsibility; but the day is plainly in prospect when the lawmaking function will be in the hands of senior women as well as senior men.

Second, the entry of women into the law makes it possible, as I noted earlier, for the gender line to be erased from the thinking function. Indeed, the very proposition that logical, rational, "scientific" thinking

can be separated from values, feelings, intuition, and the aesthetic sense is being abandoned by scientists themselves. The new wave of investigations of the human brain and mind have shed great light already on the workings of human cognition; the dualisms that have in Western culture divided mind from body, intellect from feeling, and logic from intuition are being discredited. It may be some time before the popular culture catches up with the scientists, but the gender differentiation roles that purport to divide males and females along these same lines cannot long survive the demolition of their ideological bases.

I hope, however, that this is not all, because the fact that some women will be more able in coming years to move into positions of responsibility and authority does not necessarily yield a benefit to the great majority who will continue to spend their lives bearing the burdens of subordination. The move of women into the professions has made only a miniscule contribution to the overall economic status of women; moreover, since women are not in any sense a community, it is not plausible to think that gains for some women will be shared by all women in the way it is possible to believe that economic gains for individuals in *X* ethnic group constitute benefits to "the *X* community" as a whole. And the erasing of inappropriate gender lines will not come about in our lifetime. Neither will the law or society change in ways beneficial to women except in response to the vigorous efforts of women themselves.

If women lawyers are going to make a difference for women as a class, then, we have to work at it. Some are working hard at it already, doing what lawyers arguably do best, having made service to women the organizing principle of their careers. We all owe an enormous debt to the women who have forced the public to confront the pervasiveness and subtlety of gender discrimination, who have made sexual harassment a violation of women's rights in the workplace, who have moved the practice of wifebeating out of the shadows of familiy privacy, who have called out the truth of rape as hostile attack rather than as uncontrollable excitation provoked or invited by woman the temptress. Many of the women who have devoted themselves to bringing about changes such as these are lawyers; they are our heroines; they deserve our gratitude and support; and they need to know that we are there when they need help. Great moments in history ride on the energy, intensity, and sacrifice of individuals. Don't be a spectator or a free rider; go for your moments. You owe them to your daughters and granddaughters.

Change is made of small moments, however, as well as large ones; modest revisions of perception help prepare the way for large shifts of perspective. The question is what we can all, every day, do to make this life a little better for women. That is a question that you will have to answer for yourselves, but let me give you my perspectives on the inquiry, particularly as it pertains to what lawyers are especially good at doing, which is telling stories and making arguments.

Stories are everything. People think in stories; theories and principles

are megastories, repositories of distilled stories. The law moves forward on stories. What is a case but a story? What is an argument but a story? What do lawyers do? Tell stories. What do judges and juries do? Listen to stories. The common law adversary system is built on the proposition that everyone ought to have the right to tell his or her story, and to argue about what the law is or ought to be, and to be taken seriously.

It should come to no surprise, therefore, that the law changes as the stories brought to the courts change, as the judges are forced to think about new disputes raising new issues. One major way to change the stories is to change the identity of the people telling them, both lawyers and clients. If there is a single factor that contributed more than any other to the explosion of legal change in the 1960's and 1970's it was that people who had never been heard from before — ethnic minorities, patients, clients, and consumers, welfare recipients, prisoners, women, schoolchildren — gained access to committed lawyers who could tell their stories in a way that made sense to judges. It is no surprise that those who wish to reimpose silence on the powerless seek to close off their access to the courts, to deprive them of the feeling that they have a right to be heard, or that anyone in authority cares to listen to them. I do not mean to endorse everything that has been done by courts and lawyers in the name of promoting equity; I only mean to point out that great social change can be achieved, or at least helped along, by people who can help the people in whose image the society is made to see the realities experienced by others.

For centuries now, women's voices and women's realities have been entombed in silence. Think about it: all of the official versions of reality in this society (and not only in this one) are made by men. It is male perceptions, male feelings, male patterns of behavior, masculine preferences and needs, that account for everything from the shapes of buildings to the shapes of careers. Male patterning, conscious or unconscious, is implicit in much of this culture, but largely by default, there being no female patterning to challenge it. I confess that I do not know what that female patterning might look like; but I am quite certain that we will never know until the female voices in this society succeed in telling stories about female realities that the female pattern, the female way of apprehending the world, becomes intrinsic to our idea of how the world works and how things ought to be.

Some of the people best situated to discover, or uncover, this women's reality, and to bring it into the body of official scripts, stories, and megastories by which we authoritatively pattern the world, are seated in this room. You are the women who straddle the mental gender zoning boundaries of this culture. You are the women who understand both realities. You are carrying the balanced, or potentially balanced, minds of Western culture. And there are enough of you, flooding out of the professional schools into the corridors of authority, to make a difference in the way in which the society perceives itself and the world around

it. If you use these minds well, you can make this world better for your sisters who do not have your gifts, your training, your access; and I do not hesitate to say that what is good for women is good for all of us, since women are the fulcrum of humankind. All that is required of us is the will to notice, and the willingness to speak. It may be the greatest gift that this new generation of professionally trained women can make to this culture.

High Technology, the Human Image, and Constitutional Value

Patrick Baude*

During this conference we're looking at how the legal system is supposed to respond to the problems, especially in the area of privacy and intellectual property, that the new technology may create. But it's a mistake to look at that problem as entirely a static one. The existence of this technology itself and its implications will change the process even as the process is trying to cope with the implications of the technology.

And I don't mean this in a trivial way, though in a trivial way there are some signs. Some might date the menopause of the common law, that is, the decline of judges' confident mastery of the law's growth, to the introduction of the dictating machine. In the old days, judges wrote their opinions by hand. Holmes, in fact, wrote standing up. He wrote a three or four page opinion; it was written by a human being; you could read it, you could know it, and you could understand it. Now, of course, those of you who have the curse of being lawyers realize that Supreme Court opinions not uncommonly exceed one hundred pages. That's just the dictating machine and the electric typewriter. Now that the Supreme Court is introducing word processing equipment, God save us all. The process will never be the same.

There are other straws in the wind. A recent Supreme Court case that only a lawyer could love involved this problem: the defendant's name had been misspelled from the beginning. The case got to the Supreme Court of the United States. The clerk of the Supreme Court, being a very fastidious man, noticed the misspelling. He established that throughout this litigation the name had been misspelled. It was a minor problem: how many "1" 's in Millhollin? So the Supreme Court wrote its opinion, beginning with this footnote to the caption itself: "Because legal research catalogs and computers are governed by the principle of consistency, not correctness, we feel constrained to adhere to the erroneous spelling." This is, in other words, the first instance I know of in which the Supreme Court was asked to choose between the convenience of the computer and the truth. The computer won.

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*Professor of Law, Indiana University School of Law—Bloomington. A.B., University of Kansas, 1964; J.D., 1966; LL.M., Harvard Law School, 1968. This keynote address was presented at the conference, "Who Owns Knowledge? Privacy, Intellectual Property, and the Public's Right to Know." The conference was sponsored by the Indiana Committee for the Humanities in Nashville, Indiana, on September 16-17, 1984. The Indiana Law Review expresses its thanks to the Committee for its assistance in the publication of this address.

From the days of Elizabeth I, the Lord Chief Justice of England wore on each lapel an "S." One "S" stood for *sapience*, (wisdom) and the other "S" stood for *science*. Ever since, it has pleased the law to cloak itself in science because science seems firm and hard and can be used to obscure a lot of choices. This idea has had a special appeal in the United States from the very beginning. Again, as lawyers know, of course, the first time the United States Supreme Court struck down a statute was *Marbury v. Madison*, saying that an unconstitutional statute was not law. This was wildly attacked by the Jeffersonians as improper. Then, shortly afterward, one of President Jefferson's appointees to the Supreme Court had to strike down a statute that was wildly unpopular with the Jeffersonians, but he couldn't say it was unconstitutional. So he wrote a fascinating opinion, saying that the statute violated the law of nature (i.e., science). It was therefore invalid, not because it was unconstitutional — because we (Jeffersonians) don't do that in this country — but because it violated the principles which set a limit even to the powers of the Deity Himself, namely, the laws of nature. That's a clue to what's going to happen. Often when the Supreme Court wants to pretend, "We're not doing this, this is not *our* value choice," it searches for some basis in scientific value. And this is what I think is likely to make significant the impact of dramatic new technologies on the way the Supreme Court works.

There's a central theme here that constitutional law, what the Supreme Court says, is usually based on some image of human life — what the good life is and what people are all about. You can't do law unless at your core you have some view of what people are like. Throughout this century, not often for better, this conception of the human image in constitutional law has been heavily influenced by the dominant technological or scientific view of the day.

Take this case from the beginning of the century. Berea College was a college founded in Kentucky to provide racially integrated higher education. That wasn't the most dramatic thing. The most dramatic thing was that it was to provide higher education for blacks, which was rare enough, even in a separate black institution, but Berea was integrated. The Kentucky legislature outlawed integration in higher education. Berea College brought suit which, in the end, found its way to the Supreme Court, arguing that there was a constitutional right for a private college to make its own policies — in this case, integrative, against the segregative, racist state legislature. The state legislature had relied heavily on "scientific evidence." The state called (I'm sorry to say) the man who was generally regarded as the leading anthropologist of his day. This was the beginning of a scientific image of man, which is what the name "anthropology" means. This fellow, following the Civil War, had gathered a huge collection of spent bullets. He had then collected the skulls of black soldiers, white soldiers, and soldiers who had some black and some white ancestors. He filled their skulls with shot. This was, of course, a measure of intelligence that preceded the Stanford-Binet test . . . slightly. He discovered you could get more spent bullets into the

skull of a dead white soldier than you could get into the skull of a dead black soldier. But you could get more into the skull of a dead black soldier than you could get into the skull of a mulatto soldier. This proved that mongrelization of the races resulted in the degeneration of both. And we all know what happens in college, even in the nineteenth century at Berea College. If black and white students go to the same school, the race will be mongrelized. Therefore, there was a compelling scientific justification in terms of the human image which justified suppressing racial integration for the protection of the scientific qualities of the race.

Now this vision of the human image, a scientific one, is, of course, closely related to the then-popular ideas of evolution which contributed enormously to a lot of *good* things about the law. If my theme today were the good things about the law, I'd talk about them. I'll just brush them aside now, saying it's obvious that the idea of evolution leads to our concept of a flexible legal system, of a law not written in stone, of a hope for change and improvement. But there's a negative side also to this scientific concept of the human image. Consider these two cases, one of which is remembered for its good qualities. The case is *Muller v. Oregon*. In *Muller v. Oregon*, the Supreme Court for the first time held that the state could regulate maximum hours of work. And as such, this was a case which ushered in the progressive era and an unbroken line of developments from which Ralph Nader ultimately springs: government regulation of business for the good of consumers and workers and so forth. *Muller v. Oregon* itself, however, upheld only a law limiting the work hours of *women*. It was in this case that a young (actually, middle-aged, my age) Boston lawyer named Brandeis filed the first brief in the Supreme Court ever based on social science. To this day such a brief is called a Brandeis brief. Brandeis convinced the Supreme Court, with contemporary scientific reasons, that there were valid, objective principles to permit the state to regulate the working hours of women, those principles being based on the inferiority of women. He had a ninety page brief, drawing from the leading scientific or so-called scientific sources of the day (respectable in their period, anyway — the right kind of peer reivews and professorships and so forth) pointing out that because women had a biological imperative to care for children, because they were weaker, because they lacked certain kinds of mental toughness, they simply could not be exposed to the same workplace that men could.

There's a famous case decided by Holmes a few years later: *Buck v. Bell*. Here's the textbook version of what happened in that case. A feebleminded woman was incarcerated in an institution. She bore an illegitimate child. This illegitimate child was also feebleminded. This illegitimate child, in turn, at the age of fourteen had another illegitimate child who was also feebleminded. Therefore, the state determined to sterilize the pack of them. And was this constitutional? Yes, said Holmes, in the famous quotation: "Three generations of imbeciles is enough." This is the precedent on which, by the way, some of the Nazi war

criminals accused of compulsory sterilization and euthanasia attempted to rely at the Nuremberg trials, establishing that what they had done was in line with even the great jurist Holmes. In fact, Steven Jay Gould recently went back to look at all the evidence. The only reason to suppose the eldest woman was an imbecile was that she had a mental age of seven years, eleven months on the brand new Stanford-Binet test. This made her an imbecile, middle grade, on an unvalidated, brand new test. The daughter had been placed in a foster home. The man in the family of the foster home in which she was placed raped her. She became pregnant. At that time, there was no institution to accept minor pregnant women on welfare. The only place that would accept her was a home for the feebleminded. That placement constituted her diagnosis of being feebleminded. When a social worker visited her later in her own home, she was working a crossword puzzle and living normally. Her daughter, aged six months, was diagnosed as an imbecile, based upon only the following: a social worker one day talked to a six-month-old child of one parent who happened to be a prominent political figure and also saw the six-month-old daughter of this woman. The social worker testified that the daughter seemed slow in some way; she couldn't really quite figure out how. The daughter, of course, was also a resident of the institution for the feebleminded because she was nursing and her mother was in the institution.

Now the point of all that is not, of course, that Holmes was a bad man. He expected to find these things to be true because he came to this case under the influence of a biological, anthropological image of man. People are a certain way in 1920, scientists, tough-minded and hard-thinking people believed, because of their genes. And so you find three people in an institution; you don't need to know more than that; it's what you'd expect. Why look further? That's the nature of the human condition, so sterilize them.

The social sciences themselves grew out of this crude attitude; by the 1950's there was a different image of the human condition, a different scientific image, based no longer on the biological or anthropological physical characteristics. These were the days of social psychology, of make the world better through understanding. The dominant problem, of course, in the 1950's in this country was racism. In the 1940's it had been war. Both of these problems, respectable scientists, sociologists, psychologists, and social psychologists believed, were the products of ignorance and misunderstanding. If only people could know each other better, this hostility would disappear. Thus, we would create the United Nations where we would all meet and avoid war. We would end the problems of racism if little black children and little white children went to school together. Ignorance breeds fear, fear breeds hatred, and these are facts.

There are psychological studies that prove this in the methodologies of the early 1950's. So the Supreme Court when it decided *Brown v. Board of Education* (for anybody's money, *the* great case of this century), rather than saying that racial discrimination is wrong said instead that

scientific studies demonstrate that if black and white children went to school together they would learn better and they would get along better. And, therefore, the Supreme Court was able — in a kind of buck-passing exercise — to say to the South, look, this isn't *our* idea. This is not a value choice we are making that you people have perpetuated a despicable evil too long. This is something we read in the *American Journal of Social Psychology*. It is science, not morality.

The same strain (but I won't run over this at any length) runs through many of the criminal justice opinions on which the liberal reputation of the Warren Court was based. Social scientific studies explain that poverty causes crime and that poor people are convicted because they don't have lawyers. Therefore, give them a *Miranda* warning and then they won't confess, they won't be convicted, and the problems of poverty and crime will be cured. The problem, as was quickly discovered by adept police officers, was *that the Miranda warning is an effective ploy to get people to confess*. It projects an image of fairness and receptivity; a criminal who has just been told his rights may say "what a swell guy that cop is," and then *proceed* to talk. *Miranda* hasn't had much impact on anything real. I don't want to dwell on the details beyond trying to describe the kind of relationship I'm looking at: that the scientific outlook of the time creates an image of what people are like. And this image of what people are like then determines, in the end, how the Court comes to address the great value choices which must be made.

I have been talking about the past because it's easier to see that relationship when it is not a process of which we ourselves are a part. Now I want to try to speculate about the development of technological sophistication made possible by the computer. Current technology invites us to look at all social problems as problems we have to resolve with a variety of (as we now say) "inputs" from various fields. We'll have some hard scientific data, we'll have some binding directives, we'll have intuitions of justice, moral impulses, a sense of tradition. In making a complex decision, we will draw different factors in different ways. That's what it means to exercise judgment, to make a decision.

The advent of computer sophistication creates an inevitable dichotomy between hard, quantifiable, measurable, usable data — the "good stuff," the stuff you can run on your program and it gives you an answer — and, on the other hand, all the "other stuff," which you can't really run very well on your computer. You can put it in, but you put it in a special category — it's all the same, whatever you call it. Maybe you call it a matter of taste, maybe you call it an aesthetic judgment, maybe you call it a choice made by the decision-maker, maybe you call it the responses given by the people that you're surveying — who then disappear as people because you've got their responses, which are hard data. But whenever you analyze a problem in this fashion, you inevitably break it into two parts. There's nothing wrong with that in principle. But in practice, the computer is so good, and the rest of it is just as bad as it always was, that the computer, the hard data,

the tough-minded, analytical style come to dominate. And those values which can be represented in a quantifiable way — the technological values, the facts, the science — not as a result of some decision, but *naturally* come to assume a dominant proportion.

I know, we all know, that people who work with computers in a sophisticated way are aware of this problem. They call it the GIGO problem — Garbage In, Garbage Out. But having said that, you've said about all you can say. It's our business to run the programs; the other guys bring us the garbage, and we run it through. Then they get a projection, put it on the spread sheet, and they go broke because they try to sell toothpaste in Erehwon. We predicted that if people in Erehwon *would* buy three times as much toothpaste as they had, then they would be able to, and they just didn't; that's not our problem. That's soft data; that's somebody else's problem. Nobody listens to the old salesman in baggy pants when he says, "You know, I don't think people brush their teeth in Erehwon at all. Shouldn't we start with toothbrushes?"

This is the frontier of computer work — the problem of artificial intelligence. How do you work with, or how do you develop, a computer program that is more sophisticated, that can deal with uncertainty or complexity? I once had a psychotherapeutic session with a computer. I sat down, logged in, and the computer said, "How do you feel, Patrick?" I said, "I feel like throwing up." And the computer said, "Why do you feel like throwing up?" I said, "Because I'm sick to my stomach." And the computer said, "Can you put that another way?" And I said, "Well, I feel like throwing up." And the computer said, "Perhaps it would be better if we talked about a subject you feel more comfortable discussing, Patrick."

Perhaps I shouldn't fault the computer. As a matter of fact, this whole program cost $76, and my real psychotherapist costs that every hour. So I was off cheap. But we're still a long way from a very effective kind of artificial intelligence, and yet artificial intelligence dominates. The book-bright students (the students who will be running society thirty years from now, running the courts, the legislature, the whole schmeer) read a book now called *Godel, Escher, Bach*. The book is the work of a brilliant computer scientist who shows how mathematics, art, and music are all linked together. Well, of course, they are in a way an eternal braid. Godel's a great mathematician. Escher, as you no doubt know, is an artist who specialized in mathematically fascinating drawings — optical illusions. Bach is of course a very, very great composer, but among his musical gifts is one thing that fascinates computer buffs — his ease in the counterpoint. He must have been able to think like a computer, to have all those melodies going so that they all harmonize, an incredible task. It becomes almost irrelevant that the B Minor Mass inspires awe and stirs the human soul. Not long ago, students took to Camus, Hemingway, Picasso — not artists whose greatness could be expressed quantifiably. But Bach is the greatest contrapuntal writer in the history of music, and Escher's drawings evince a mathematical complexity that would boggle even a very fine program. We are founding

a world in which artificial intelligence is . . . what? Feeling. Soft. One has *indeed* (not measured) the course of history to be this or that — that's feeling. As yet we don't have a science of artificial *feeling*. When cocaine ever becomes legal and cheap, we'll have the artificial feeling to go with the artificial intelligence.

The point I'm trying to make is that there is a category of things which are not feeling but are not scientific either. There exists a category of human judgment something more than "I like chocolate," but something less than "two to the i pi minus one equals almost zero." "Almost," because on a calculator you have to round it off. Take, for example, a simple case: artistic criticism. Critics are subjective — it doesn't mean anything, there's no truth, I don't know much about art, I know what I like. But it's still true that it is possible to look at a drawing my son has drawn next to whatever you like, whether an Escher or a Picasso. You can discuss rationally why one is a better drawing than the other. Somebody could still even say, "Well, I like this one better." But there is a series of arguments about why this one is better than the other one that is not just "I like it," but is discussion in terms of criticism. Much, of course, of law, of legal analysis, is the same stuff. It's more than just "I'm a Democrat, therefore, I like criminals," or "I'm a Republican, therefore, I like money," but it isn't hard and objective and quantifiable. Look, for example, at the case of a deformed infant, seriously retarded with a variety of medical problems — Baby Doe, Baby Jane Doe. If you root your view in technology, you come down just to two choices. On the one hand, the situation is all quantifiable. If the baby has an operation, there will be a 93% chance of this and a 47% chance of that. If the baby grows to maturity with Down's Syndrome, there will be an 81% chance of this and a 37% chance of that. On the other hand, what do you have? The taste of the parents. Some parents like kids with Down's Syndrome because they like all kids; some parents don't. If you break the problem down, putting on one side a whole range of human considerations and lumping them all together, just like the question of, "Do parents have a right to teach their kids French or not?" and then on the other side this seemingly precise prediction that the child will be like this in all probability, the precision of the one almost always outweighs and obscures the complexity of the other. Yet one cannot reach a convincing resolution to a problem like that without imagining the agony of the parents in making the decision, without imagining the life of the child, not on the .3 probability of this but on the real life of that child. And, of course, one needs to know more about who made these probability judgments, what perspective they made them from, what their motivation in making them was.

The inevitable consequence (if you'll pardon the too-simple metaphor) of running the problem through a computer will be that the key question, which is the relationship between parent and child — whether the action or decision is motivated by love and concern for the family and what the parents believe to be the best interest of the child, or some shallower, baser, or less-informed consideration — will be totally obscured because

one just can't quantify the difference among loving, mistaken parents, accurate, semiloving parents, and callous, indifferent parents. So, we will too often turn to the quantifiable, to the known, in order to obscure and, in the end, therefore, to eliminate the critical moral judgments which otherwise have to be made.

Or take the issue of the rights of defendants in criminal cases. Should we exclude unconstitutionally gathered evidence or should we not? It is now possible to demonstrate by mathematical studies that the exclusionary rules have a fairly insignificant effect on police conduct. These studies may or may not be correct, and people can answer them by doing different studies in a different way. So now, everybody's off and running on these statistics. What do they show? Well, in the end, I'm convinced they're going to show that the exclusionary rule doesn't have much effect on deterring most police conduct for a variety of different reasons. So we're going to throw it out. Or if, on the other hand, we find it does, we'll keep it. No one is going to talk (because you can't quantify this) about what it means to live in a society in which police officers routinely violate the Constitution and nothing happens except that society ratifies the consequences of that unconstitutional action. Now I can't quantify that. I don't mean to say I know, what it means to live in a society like that. It probably isn't terrible; it's not awful to live in England, for example. But that's an important question. If we just don't talk about it because we can't (again, pardon the crudeness of the metaphor) run it through the computer, our social lives will be impoverished and our computers as happy as they can manage to be. No one will ever say exactly that's what we're doing. It will just ooze that way. What will be lost is a subtle but important distinction between two arguments. On the one hand is the reflex liberalism that a cop should not violate the Constitution. On the other hand is the not necessarily liberal conviction that it is one thing for the law to be violated and another for society openly to tolerate law violations. The difference here is as fundamental as the difference between Ralph Nader and Socrates. But even a demographer could tell us that Nader and Socrates each qualify identically as one featherless biped.

Another example is the problem of affirmative action. It's a fact (for better or worse, there are many explanations, but I'm not now concerned with what they are) that in most institutions of higher education which admit students some minority races do not have statistically the same profile as others do. The question is what do you do about this? The argument can take two different directions. One, those who have been excluded by the application of mathematical or statistical criteria can challenge the criteria themselves. They can say, well, it's true that I only got a score of 3.7 when the average is 4.2, but that test is culturally biased, and therefore it's not a valid, objective procedure. To run *me* through a computer you need to input an additional .5 points, and then you can put me into the entering class. And you can then have an argument about whether there is or is not cultural bias. Well, it's a good argument. I don't think anyone yet knows the answer.

Yet the more we talk about that, the less we concentrate on the real choice, a decison between two great moral claims. One is the moral claim of those who have been the victims of denial of currently meaningful access to the resources of society (a valid claim, it seems to me) against another also important claim that white persons who cause no injury to these individuals should not be the ones to pay the price. Those are both non-quantifiable claims. They are exceedingly difficult, I think, to reconcile in a conscientious and satisfactory way that would convince somebody who didn't already agree with us. That process is so hard, and it's much easier to show that there is or is not cultural bias, which there may or may not be, but it will miss the point. It will dominate the decision-making because we are comfortable, or we will become comfortable with the seeming objectivity of that particular process, rather than giving full weight to the other different claims. The other claims are just all *feelings*. You equate the same feelings, the feelings of a hateful racist who wants to kill black people, with the feelings of some perfectly decent person who believes that affirmative action is wrong for complex reasons. These feelings are not the same. On a public opinion poll, they come out the same, and they go into the computer the same, but they're not. And that answer will be obscured even though, as I say, everybody will say, "Well, we know this is important, but we don't know what to do with it." When you don't know what to do with it, in the end it just stops coming up on the printouts further and further down the line.

A final example, rather along those same lines, I think, is the question about pornography. The city of Indianapolis, for example, has recently debated the relationship between pornography and violence against women. This debate has not been for the sake of public education but instead for the purpose of justifying a prohibition of some sexually exploitative material. Although not itself an academic exercise, this debate has grown in part from the fact that Professor Donnerstein at the University of Wisconsin has shown a series of violent movies and dirty movies to a bunch of people; some of the people who have seen violent movies seem to be desensitized to rape and those who have seen dirty movies don't seem to be, but some of those who have seen violent and dirty movies do seem to be even more desensitized than those who have seen either violent movies or dirty movies. Some people are more aroused by violent movies than dirty movies. Some people, he said, shouldn't be shown the movies (even experimentally) because they had the profiles of rapists and he wouldn't be responsible for what happened. This information is fascinating stuff, and I'm sure we all wish Ed Donnerstein every success in his academic career. Still, let's not forget the real question, which is how we shall balance two different interests, tastes, concerns, moral principles, whatever you call them — how you balance the two against each other. On the one hand is, of course, the evil of ever allowing society to dictate reading matter for anybody; on the other hand is the fact that violent pornography, whether it causes harm or not, is a pollutant, a bad thing. We've got to make a choice between

those two things. They are arguments or concerns of a different order. They are not just two different answers on a public opinion poll. If what you want in the end are the right answers on a public opinion poll, just do a public opinion poll, run it through the computer, and dispense with the legislature. You'll get a democracy, for a while, but not much of a constitutional system.

These dominant views, these principles, of course, are not forged once judges come to the Supreme Court. They are views that are worked out, usually in the universities, where students learn them, professors formulate them; they leak out, they ferment, and people who come to the Supreme Court bring these ideas with them. Holmes, of course, did not himself think up the biological image of man; he learned it from Louis Agassiz at Harvard, and so on. In American legal education, probably the most powerful intellectual movement of the last ten or fifteen years has been the movement called law and economics. Law and economics is devoted to analyzing legal problems upon the assumption that the underlying legal transaction is structured in the best interests of the parties as measured economically. And once you make that assumption an enormous wealth of analytical power (pardon me, again, the computer) then becomes available. Because once you have an economic problem, you can solve it. Sadie comes in to see me, and she wants a divorce from George. Is this a personal tragedy or an opportunity for a new life? How could I know? But if Sadie comes in and she wants $810 from George and George wants to give her $603 a month and they have two children and I have some statistics and there's a bargaining process and a model, then I can tell you she's going to get $713.50 plus or minus $8.37 — and minus my fee, of course.

The very power of this manner of thinking, or this manner of analyzing, has made the discipline of law and economics enormously productive and fruitful in legal education. Indeed, there are three men formerly in academic life who are usually credited with bestowing intellectual respectablility to this movement. One of them is Judge Posner of the Seventh Circuit, another is Judge Bork of the District of Columbia Circuit, and another is Judge Winter of the Second Circuit. According to the *Wall Street Journal*, these men are three of the four people that President Reagan is most likely to put on the Supreme Court of the United States if he has a chance.

The dominant characteristic of the law and economics movement is much like what I'm trying to describe as the technological image of human behavior. Its assumption is that people act for quantifiable reasons. As long as you're acting for quantifiable reasons (you're in business and you're trying to increase your market share of toothpaste) your behavior is predictable because your motivation is simple. It is more money. And it therefore becomes quantifiable and powerful. So law and economics has been enormously successful in analyzing problems of business law — the law of contracts, the law of negotiable instruments, antitrust law, and the like. It has been remarkably less effective, it seems to me, when you deal with areas in which people's motivation is not

primarily economic. There's a famous study by an economist proving that capital punishment is a deterrent. It's a long argument with a lot of multiple regression analysis, but if you look at it closely, it is that we all know people seek desirable consequences and avoid undesirable consequences. This an economist quickly obscures by telling you it's an indifference curve, and people act so as to maximize their utility upon an indifference curve between killing and freedom.

Once we start with the assumption that people are trying to avoid death, we can draw a lot of indifference curves, do a lot of shuffling, run it through the computer many times, and it turns out, no matter how many other assumptions we make, that capital punishment is a deterrent. That seems to me an example of what I mean by the difficulties of this law and economics model (which is one version of the technological model) as it is applied to the problems of constitutional law and value choice rather than to business decision-making. It seems to me that the likelihood of the elevation to the Supreme Court of the three leaders of this movement suggests that I am not worried about some merely speculative possibility.

Well, if that's so, what can we do about it? It would be nice to say, send those cards and letters in, write to Chief Justice Burger and enclose a volume of poetry. This is no way to stop a tide of history. There it is. What can we do about it? Not very much, as far as I know. But there is one thing. At least try not to be intimidated by everybody else who will use these arguments. Try to remember always that the non-quantifiable has not received its full play and that there are significant differences between various kinds of non-quantifiable arguments. Just remember that when someone tells you that your belief that the emerging aspirations of black people of the United States need to receive a full share of social justice is a matter of taste, he may be right. But it is not the same kind of matter of taste as it is when I say that I think that Rolling Rock is better than Budweiser. That's all I have to offer. Thank you.

Notes

Punitive Damages for Crime Victims: New Possibilities for Recovery in Indiana

I. Introduction

In its 1978 decision in *Glissman v. Kutt*,[1] the Indiana Court of Appeals held that plaintiffs injured in an automobile accident could not recover punitive damages against a defendant convicted of reckless driving for the same accident. The court found that it would be "contrary to the basic concerns of punitive damages . . . [to] permit both criminal prosecution and the sanction of punitive damages where the defendant's conduct merely exhibited a 'heedless disregard of the consequences' to his victim."[2] The *Glissman* decision reaffirmed the rule first announced by the Indiana Supreme Court in 1854 in *Taber v. Hutson*:[3]

> [T]here is a class of offenses, the commission of which, in addition to the civil remedy allowed the injured party, subjects the offender to a state prosecution. To this class the case under consideration belongs, and if the principle of the instruction be correct[4] Taber may be twice punished for the same assualt and battery. This would not accord with the spirit of our institutions. The constitution declares, that 'no person shall be twice put in jeopardy for the same offense,' and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more.[5]

Since *Taber*, Indiana has been among the minority of states disallowing punitive damages in a civil action where the defendant is also subject to criminal prosecution arising from the same act.[6] In light of

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[1]175 Ind. App. 493, 372 N.E.2d 1188 (1978).

[2]*Id.* at 497, 372 N.E.2d at 1191.

[3]5 Ind. 322 (1854).

[4]At the plaintiff's request, the lower court had instructed that "it is the true policy of the law . . . not only to give compensation for the actual loss, but to give such additional damages as will tend to prevent such conduct, and give peace and security to private rights and the community in general." *Id.* at 324.

[5]5 Ind. at 325-26.

[6]A sampling of other cases espousing the double jeopardy safeguard includes Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884) (legislatively overruled); Angelloz v. Humble Oil & Ref. Co., 196 La. 604, 199 So. 656 (1941); Winkler v. Koeder, 23 Neb. 706, 37 N.W. 607 (1888); Fay v. Parker, 53 N.H. 342 (1872). *Cf.* Louisville, New Albany & Chicago

the unjust results often fostered by the application of *Taber* in various types of litigation[7] and in an effort to placate increasing judicial dissatisfaction with the rule,[8] the Indiana State Legislature in 1984 reversed long standing precedent by eliminating criminal prosecution as a defense to a civil claim for punitive damages.[9] The new statute reads in relevant part:

> It is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action.[10]

In enacting the statute, Indiana has adopted the majority rule.[11] The legislature's conformity to the majority position will inevitably increase a plaintiff's opportunities for recovery of punitive damages.

This Note will initially trace the downfall of the *Taber* rule in Indiana and uncover several areas of litigation where the rule's previous application has produced unsatisfactory results. The discussion will then turn to defining the criminal activity most likely to be affected by the new statute as evidenced by other states, and an analysis will be made of the legislative and anticipated judicial efforts to control its possible misuse. The Note will conclude by assessing the crime victim's realistic chances for recovery under the new statute and the statute's impact on Indiana's victim compensation program. Before defining the limits of the new statute, a brief examination of the purposes and historical development of punitive damages is necessary.

Ry. Co. v. Wolfe, 128 Ind. 347, 27 N.E. 606 (1890) (punitive damages award justified because conduct complained of was not punishable criminally). *Contra* Smith v. Bagwell, 19 Fla. 117 (1882); Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911).

[7]*See infra* notes 53-55 and accompanying text.

[8]*See* Smith v. Mills, 179 Ind. App. 459, 385 N.E.2d 1205 (1979) (stating that the rule was ripe for reconsideration).

[9]Act of Feb. 29, 1984, Pub. L. No. 172, 1984 Ind. Acts 1462 (codified at IND. CODE § 34-4-30-2 (Supp. 1985)).

[10]*Id.* Other jurisdictions have enacted similar laws. *See, e.g.*, COLO. REV. STAT. § 13-21-102 (1973) (allowing assessment of punitive damages for wrongs committed against an individual, or to personal or real property); Ga. Code § 51-12-5 (1982) (punitive damages allowed in tort actions in which aggravating circumstances are present); MONT. CODE Ann. § 27-1-221 (1983) (civil punitive award permitted where the defendant has been guilty of oppression, fraud, or malice); N.C. GEN. STAT. § 99A-1 (1979) (recovery of punitive damages allowed for interference with property rights). A punitive damages provision has also been incorporated within the Texas constitution. TEX. CONST. art. XVI, § 26 gives a surviving spouse or heir a claim for punitive damages against a person or corporation guilty of homicide.

[11]In determining the propriety of a punitive damages award, the vast majority of courts have considered it immaterial that the defendant is also subject to criminal prosecution for the same act. One decision in this state has even recognized, "Indiana is in the distinct minority of states which disallows exemplary damages in a civil action if the party against whom they are levied is subject to criminal prosecution arising out of the same act." Cohen v. Peoples, 140 Ind. App. 353, 356, 220 N.E.2d 665, 668 (1966).

II. An Overview of Punitive Damages

A. The Origins and Purposes of Punitive Damages

The doctrine of punitive or exemplary damages[12] originated in the 18th century English courts as a justification for jury money awards greatly in excess of the tangible harm suffered by the plaintiff.[13] Juries were endowed with a judicial grant of unlimited discretion in gauging the severity of a punitive award.[14] Their verdicts were rarely reviewed by the courts, especially where the conduct in question had caused personal suffering.[15] This grant of unlimited discretion was bestowed upon juries very early in several American jurisdictions.[16] The awards rendered by juries in these jurisdictions involved elements of intangible harm.[17]

By the nineteenth and twentieth centuries, however, punitive damages were used almost exclusively to deter and punish the defendant where compensatory damages failed to achieve similar results.[18] In short, they

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[12]"Punitive" and "exemplary" are terms most commonly applied to this class of money damages. Throughout this Note, these damages will be referred to as punitive damages.

Punitive damages are distinguished from compensatory damages in that an award of the latter is merely intended to make the plaintiff whole, replacing the loss caused by the wrong or injury and nothing more. Punitive damages transcend actual damages and are inflicted not because of any special merit in the injured party's case, but to punish the defendant and to make an example for similar wrongdoers. Because of this punitive purpose, punitive damages are usually not covered by liability insurance. *See* Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962). For a general discussion of punitive damages in a tort action see W. Prosser, Law of Torts § 2 (4th ed. 1971).

[13]The case generally cited as establishing the rule of punitive damages is *Huckle v. Money*, 2 Wils. 205 (K.8. 1763). In *Huckle*, Lord Camhen sanctioned the jury's condemnation of the defendant's abuse of state authority by upholding a large money award even though the plaintiff's actual damages were negligible. For a general discussion of the law of punitive damages, see K. Redden, Punitive Damages §§ 2.1-2.9 (1980); 1 T. Sedgwick, A Treatise on the Measure of Damages § 348 (9th ed. 1912).

[14]*See* K. Redden, *supra* note 13, § 2.2(A)(2), at 26; *see also* W. Hale, Law of Damages, 201-10 (1896). (It is within the province of the court to determine whether the evidence supports an award; however, it is within the exclusive province of the jury to determine whether or not it should be awarded.).

[15]T. Sedgwick, *supra* note 13, § 349, at 688.

[16]*See, e.g.*, Tillotson v, Cheetham, 3 Johns 46 (N.Y. Sup. Ct. 1808).

[17]W. Hale, *supra* note 14, at 202. Some examples include mental anguish, humiliation, and injury to reputation.

[18]*See* Tillotson v. Cheetham, 3 Johns 56 (N.Y. Sup. Ct. 1808). In a New York action for libel, Judge Spencer emphasized the objectives of the punitive damages rule: "In vindicative actions such as for libel, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury that they are to inflict damages for example's sake, and by way of punishing the defendant." *Id.* at 64.

The dual objectives of deterrence and punishment are also a part of the Indiana law on punitive damages. *See, e.g.*, Riverside Ins. Co. v. Pedigo, 430 N.E.2d 796, 809 (Ind. Ct. App. 1982); Monte Carlo, Inc. v. Wilcox, 180 Ind. App. 669, 672, 390 N.E.2d 673, 675 (1979); Vaughn v. Peabody Coal Co., 176 Ind. App. 474, 481, 375 N.E.2d 1159,

protected society "against a violation of personal rights and social order."[19]

B. *The Culpability Requirements of Criminal and Civil Punishment: A Comparison*

In a criminal proceeding, the prosecutor must prove that the defendant had the intent, or mens rea, to commit the offense. This criminal intent is found in the actor's desire to cause the consequences of his act, or in his belief that the consequences are substantially certain to result from it.[20] This element must also be established to recover punitive damages in a civil action.[21]

To support an award for punitive damages in a civil action, however, the plaintiff has the additional burden of proving some aggravating circumstance such as malice, fraud, ill will, or a conscious disregard for the rights or interests of others.[22] It is this element of wantonness for which the law inflicts punishment. This added requirement is generally satisfied by offering either direct or circumstantial evidence of the defendant's state of mind or underlying motive.[23]

Punitive damages are generally not awarded for simple acts of negligence.[24] Rather, conduct resulting in a punitive damages award often involves "some element of outrage similar to that usually found in a

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1163 (1978).

In addition to the punitive aspect, punitive damages may also serve as a revenue mechanism. *See, e.g.*, Gostkowski v. Roman Catholic Church of the Sacred Heart, 262 N.Y. 320, 324-25, 186 N.E. 798, 800 (1933) (jury permitted to award damages which express indignation at the defendant's conduct rather than establish a value for plaintiff's loss).

[19]W. HALE, *supra* note 14, at 201.

[20]*See* Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. Rev. 1158, 1163 (1966).

[21]*Id.*

[22]"Punitive damages may be awarded when there is a finding of fraud, malice, gross negligence, or malicious or oppressive conduct on the part of the defendant." Vaughn v. Peabody Coal Co., 176 Ind. App. 474, 480, 375 N.E.2d 1159, 1163 (1978). *Accord* Klam v. Koppel, 63 Idaho 171, 118 P.2d 729 (1941); Brademas v. Real Estate Dev. Co., 175 Ind. App. 239, 370 N.E.2d 997 (1977); Jones v. Ross, 141 Tex. 415, 173 S.W.2d 1022 (1943); Baker v. Marcus, 201 Va. 905, 114 S.E.2d 617 (1960). While "intentional" or "willful" denotes a mental state accompanying the defendant's act, "malice" describes an act *known* to be harmful to another. *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 35 (1982).

[23]Wantonness may be inferred from the surrounding facts and circumstances. *See, e.g.*, Watkins v. Layton, 182 Kan. 702, 324 P.2d 130 (1958); Hannahs v. Noah, 83 S.D. 296, 158 N.W.2d 678 (1968).

[24]*E.g.*, Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977); Louisville, New Albany & Chicago Ry. Co. v. Shanks, 94 Ind. 598 (1883); Prudential Ins. Co. of Am. v. Executive Estates, Inc., 174 Ind. App. 674, 369 N.E.2d 1117 (1977); Sinclair Ref. Co. v. McCullom, 107 Ind. App. 356, 24 N.E.2d 784 (1940); McNamara v. St. Louis Transit Co., 182 Mo. 676, 81 S.W. 880 (1904).

crime."[25] Punitive damages are subject to the discretion of the jury,[26] and, unlike compensatory damages, are not recoverable as of right.[27] Furthermore, a punitive award is predicated upon the finding of actual damages[28] and must generally bear some relation to the amount of the compensatory damages award.[29]

Punitive damages have not been favored in the law[30] and throughout their long history have been widely criticized.[31] Nonetheless, the majority of jurisdictions, including Indiana, have continued to follow the doctrine "more because of precedent than anything else."[32]

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[25]RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979).

[26]*See, e.g.*, Hall-Hottel Co. v. Oxford Square Co-op., Inc., 446 N.E.2d 25 (Ind. Ct. App. 1983); American Family Ins. Group v. Blake, 439 N.E.2d 1170 (Ind. Ct. App. 1982). In fact, it is error to instruct the jury to award punitive damages. *See* McClellan, *Exemplary Damages in Indiana*, 10 IND. L.J. 275, 283 (1935).

[27]*E.g.*, Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268, 113 N.E. 1019 (1916).

[28]*See* Hubbard v. Superior Ct. of Maricopa County, 111 Ariz. 585, 535 P.2d 1302 (1975); Martin v. United Sec. Serv., Inc., 314 So.2d 765 (Fla. 1975); Baker v. American States Ins. Co., 428 N.E.2d 1342 (Ind. Ct. App. 1981); Newton v. Yates, 170 Ind. App. 486, 353 N.E.2d 485 (1976); Stratton v. Jensen, 64 Mich. App. 602, 236 N.W.2d 527 (1975).

[29]*See* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. Rev. 1173, 1180 (1931); *see also* Murphy Auto Sales v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953). Under current Indiana law, there is no rule that the amount of punitive damages must be within a certain ratio to compensatory damages. *See* Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977); Nate v. Galloway, 408 N.E.2d 1317 (Ind. Ct. App. 1980). *But see* Bangert v. Hubbard, 127 Ind. App. 579, 126 N.E.2d 778 (1955), *trans. denied*, 237 Ind. 5, 143 N.E.2d 285 (1957).

[30]*See* Aladdin Mfg. v. Mantle Lamp Co. of Am., 116 F.2d 708, 717 (7th Cir. 1941); *see also* Walther & Plein, *Punitive Damages: A Critical Analysis*, 49 MARQ. L. REV. 369, 380 (1966). Although arguments have been advanced both for and against the doctrine in every state, nearly every state has accepted the concept of punitive damages to some degree. *Id.*

[31]The doctrine of punitive damages has been attacked from many corners. It has been argued frequently that punishment is not a proper object of the civil law and that the state alone has the power to inflict penalties. *See* Morris, *supra* note 29, at 1176. Moreover, if the wrongdoer has been sufficiently punished in a criminal court, a further intrusion into his economic resources as a deterrent to future wrongful acts is not necessary. *Id.* at 1195.

Another criticism of the doctrine of punitive damages relates to the unregulated power of the jury to determine the amount of the award. For a critique of jury awards against corporate defendants, see DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, 43 INS. COUNSEL J. 344 (1976). To eliminate the "Robin Hood" philosophy — the practice of taking from a wealthy corporation and giving to a needy plaintiff — DuBois suggests that the jury should be restricted to *determining* if the defendant should be punished, while the court would be solely responsible for fixing the amount of damages awarded. *Id.* at 353.

Despite these criticisms of the rule, punitive damages have been defended "as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime, and which a private individual would otherwise find not worth the trouble and expense of a lawsuit." W. PROSSER, *supra* note 12, § 2, at 11 (footnote omitted).

[32]*See* McClellan, *supra* note 27, at 286. Indiana courts have sometimes disagreed

C. *Criminal and Civil Penalties: Similarity of Purpose, Differences in Effect*

Because the purposes of criminal penalties and punitive damages are identical — deterrence, retribution and punishment — an award of such damages with the goal of civil punishment has been described as a legal anomaly.[33] Despite similarity of purpose, the effects of civil and criminal punishment are unequal. Whereas a punitive damages award only invades the defendant's pocketbook, criminal penalties often include a loss of freedom,[34] warranting the protection of special procedural safeguards.[35] A criminal conviction also carries with it a social stigma not found with a determination of civil liability.[36]

Notwithstanding the disparate impact of civil and criminal sanctions, both constitute a form of punishment. Where conduct results in both civil and criminal accountability, the defendant is not only confronted with a potential loss of liberty, but with an intrusion into his financial resources as well. It is for this reason that the Indiana Supreme Court adopted a seemingly broad interpretation of the constitutional protection against double jeopardy in the *Taber* decision.[37]

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with the entire doctrine. *See, e.g.*, Western Union Tel. Co. v. Bierhaus, 8 Ind. App. 563, 36 N.E. 161 (1893). In an attempt to limit punitive damage awards to the most deserving plaintiffs, the Indiana Legislature has raised the standard of proof for punitive damages to "clear and convincing" evidence. *See infra* note 156 and accompanying text.

[33]*See* Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 409-11 (1976) [hereinafter cited as Note, *Criminal Safeguards*].

[34]The threat of imprisonment also accompanies a criminal fine. *See, e.g.*, IND. CODE § 35-50-2-6 (1982) (Class C felonies in Indiana are punishable by both a fixed term of imprisonment and a criminal fine.).

[35]Examples include the higher standard of proof of "beyond a reasonable doubt" and the protection against self-incrimination. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 4, at 16, 22, and 161 (1972).

[36]"There is no blank on a job application for listing past punitive damages judgments." *See* Note, *Criminal Safeguards, supra* note 33, at 411.

[37]U.S. CONST. amend. V provides in relevant part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The double jeopardy clause applies to the states through the due process clause of the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969). IND. CONST. art. I, § 14 reads, "No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself." The *Taber* rule outlawing punitive damages in a civil action where the tortious act is also criminally punishable was founded on the spirit, not the letter, of the fifth amendment's prohibition against double jeopardy. Note, *Criminal Safeguards, supra* note 33, at 413. The fifth amendment's prohibition is applicable solely to successive criminal punishments for the same offense and does not relate to the remedies secured by civil proceedings. *See* Breed v. Jones, 421 U.S. 519 (1975) (the risk to which the double joepardy clause refers is not present in proceedings that are not essentially criminal); Rex Trailer Co. v. United States, 350 U.S. 148 (1956) (a liquidated damages clause was found to be remedial in nature, therefore not constituting a second criminal penalty); Helvering v. Mitchell, 303 U.S. 391 (1938) (double jeopardy clause merely prohibits punishing the defendant twice for the same act or omission, or attempting for a second time to punish him criminally).

Prior to the legislative enactment of Indiana Code section 34-4-30-2, the *Taber* rule had been criticized for disregarding the practical inner workings of the modern criminal justice system. The rule had also been discredited for its incongruous effects when applied to certain classes of lawsuits.[38]

III. The Inadequacies of the *Taber* Rule

A. The Taber *Rule Ignored the Practicalities of the Modern Criminal Justice System and Failed to Distinguish Criminal and Civil Redress*

With respect to the practical realities of the criminal justice system, the most troublesome flaw of the doctrine announced in *Taber* was its failure to acknowledge the distinction between private and public redress.[39] The majority of jurisdictions have long recognized that an act punishable as a tort and as a crime is both an offense against society at large, for which the state, as the public's representative, will prosecute to vindicate the interests of society as a whole, and a personal wrong committed against an individual, for which he may seek private vindication in a civil court.[40] Thus, punitive damages are not granted in lieu of criminal punishment, nor do they have any necessary relation to the penalty incurred for the injury done to the public.[41] Rather, punitive damages supplement criminal penalties by addressing the interests of the individual victim.

Under the *Taber* rule, those plaintiffs who had been willfully and intentionally injured and who were in the best position to advance the punishment and deterrence objectives of punitive damages were completely precluded from seeking punitive relief.[42] As a consequence of a variety of factors, such as the prosecutor's unlimited discretion in trying cases, problems of proof, or the difficulty in meeting the procedural requirements of a criminal proceeding, the same reprehensible conduct for which the culpable party escaped civil liability for punitive damages

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[38]Note, *Double Jeopardy and the Rule Against Punitive Damages of* Taber v. Hutson, 13 Ind. L. Rev. 999, 1004 (1980) [hereinafter cited as Note, *Double Jeopardy*].

[39]McClellan, *supra* note 26, at 279.

[40]W. Prosser, *supra* note 12, at 7.

[41]*See* Soucy v. Greyhound Corp., 27 A.D.2d 112, 276 N.Y.S.2d 173 (1967), where the court held, "While an award of such damages is concededly punitive, it is in our opinion, in fact, a private remedial remedy rather than a public criminal sanction." *Id.* at 113, 276 N.Y.S.2d at 175.

[42]Thus, the victim of an aggravated assault and battery was barred from seeking punitive damages against the culprit, despite his ability to satisfy the lower standard of proof required in a civil action because of the culprit's possible exposure to criminal prosecution. *See, e.g.*, Borkenstein v. Schrack, 31 Ind. App. 220, 67 N.E. 547 (1903).

as a result of *Taber* frequently went unpunished at the criminal level.[43] The possibility existed for what was in all practical effects total exoneration of the defendant in the majority of these cases.[44] In this manner, the rule not only afforded blanket protection against double jeopardy, but succeeded in warding off initial jeopardy as well.

Although originally rooted in the constitutional protection against double jeopardy, the *Taber* rule ironically failed to serve the fundamental objectives of the constitutional guarantee upon which it was based. One of the underlying objectives of the constitutional protection against double jeopardy is eliminating the fear of having to endure multiple trials.[45] But where the state decided to prosecute conduct which was the subject of a civil suit — this situation was more typical of an aggressive act, such as a violent assault — the defendant was still made to suffer two trials despite the doctrine's restraints.[46] Although plaintiffs were prohibited from seeking punitive damages against individuals subject to criminal prosecution, they were still permitted to bring claims for compensatory damages.[47] Moreover, while a criminal trial did not prohibit a tort claimant from seeking reasonable compensation for his loss, the fact that a defendant was being sued in tort barred the state from seeking criminal punishment.[48] Although the *Taber* rule might have lessened the defendant's exposure in a civil trial, it failed to fully and "effectively implement the double jeopardy purpose of diminishing the uncertainty

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[43]*See* Note, *Double Jeopardy, supra* note 38, at 1004-05; *see also* McLemore, *Punitive Damages and Double Jeopardy: A Critical Perspective of the* Taber *Rule*, 56 IND. L.J. 71, 82-83 (1980). *See generally* Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 *N.Y.U. L. Rev.* 925 (1960); Tieger, *Police Discretion and Discriminatory Enforcement,* 1971 *Duke L.J.* 717 (1971).

[44]*See* McLemore, *supra* note 43, at 82. The victim could still bring an action for compensatory damages, however.

[45]*See* McLemore, *supra* note 43, at 85.

[46]*See* Stone v. United States, 167 U.S. 178, 188-89 (1897) *noted in* McLemore, *supra* note 43, at 85.

Interestingly, double jeopardy principles do not prevent the double conviction and punishment of a defendant for a crime and conspiracy to commit that crime, even though both offenses stem from the same prohibited conduct. *See* Iannelli v. United States, 420 U.S. 770 (1975); Blockhurer v. United States, 284 U.S. 299 (1932); *see also* Elmore v. State, 269 Ind. 532, 382 N.E.2d 893 (1978) (where the court focused on the identity of the offenses, not on the identity of their source); Durke v. State, 204 Ind. 370, 183 N.E. 97 (1932); Collier v. State, 173 Ind. App. 120, 362 N.E.2d 871 (1977). It is well established in Indiana that the legislature may prescribe both criminal and civil penalties for the same act without transgressing the spirit of the double jeopardy provision. *See* State *ex rel.* Beedle v. Schoonover, 135 Ind. 526, 35 N.E. 119 (1893). *See generally* Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945).

[47]Individuals may always seek civil redress for actual losses suffered because the allowance for compensatory claims is premised on the wholly remedial nature of such damages. Stone v. United States, 167 U.S. 178, 188-89 (1897).

[48]"[T]his court does not view the rule . . . as being one based on the probability of criminal prosecution but rather on the possibility of such prosecution." Moore v. Waitt, 157 Ind. App. 1, 8, 298 N.E.2d 456, 460 (1973).

which a defendant faces from the possibility of enduring multiple trials as a result of a single act or course of conduct."[49]

B. Types of Litigation Where the Taber *Rule Has Produced Inconsistent Results*

The doctrine also created anomalous results when applied to certain types of litigation. For example, when an individual had suffered harm to his character or reputation because of the culpable acts of another,[50] he was permitted to recover punitive damages. Because the tort of defamation was not punishable as a crime in Indiana, such recovery was not precluded.[51] Yet, when a plaintiff was physically injured, his claim against the wrongdoer was restricted to compensatory relief. Plaintiffs who were victims of aggravated assault — punishable as a crime in Indiana — provide an illustrative example.[52] With regard to these acts, *Taber* created the unusual situation of increasing the opportunities for relief for one whose name had been slandered while limiting the monetary recovery for one whose body had been beaten.[53]

The *Taber* rule fostered other disturbing results. For instance, while minors were generally held civilly accountable for their tortious acts,[54] only after the age of fourteen were they presumed capable of committing crimes.[55] Thus, a victim of an intentional wrongdoing committed by a

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[49]*See* McLemore, *supra* note 43, at 85.

[50]*See* IND. CODE § 34-4-13-1 (1982) (general statute governing the standard of proof in a civil action for libel and slander).

[51]*See* Note, *Double Jeopardy, supra* note 38, at 1005.

[52]*Compare* IND. CODE § 34-4-13-1 (1982) (libel and slander) *with* IND. CODE ANN. § 35-42-2-1 (Burns Supp. 1984) (battery).

[53]*See* Note, *Double Jeopardy, supra* note 38, at 1005-06.

[54]Daugherty v. Reveal, 54 Ind. App. 71, 78, 102 N.E. 381, 384 (1913); *accord*, Patterson v. Kasper, 182 Mich. 281, 148 N.W. 690 (1914); Rozell v. Rozelle, 281 N.Y. 106, 22 N.E.2d 254 (1939); Lowery v. Cate, 108 Tenn. 54, 64 S.W. 1068 (1901); Wisconsin Loan & Fin. Corp. v. Goodnough, 201 Wis. 101, 228 N.W. 484 (1930).

[55]*See* Note, *Double Jeopardy, supra* note 38, at 106; *see also* Bottorff v. South Constr. Co., 184 Ind. 221, 227, 110 N.E. 977, 978 (1916) *noted in* McLemore, *supra* note 43, at 89; *accord*, State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), *cert. denied*. 401 U.S. 942 (1971).

Many jurisdictions have codified this common law rule. *See, e.g.*, State v. Taylor, 109 Ariz. 481, 512 P.2d 590 (1973); Stanley v. State, 248 Ark. 787, 454 S.W.2d 72 (1970). The presumption that children under the age of fourteen are incapable of committing crimes is, however, rebuttable. *See* Senn v. State, 53 Ala. App. 297, 299 So.2d 343 (1974); *In re* Davis, 17 Md. App. 98, 299 A.2d 856 (1973).

Even minors who have been processed through the juvenile court system are not characterized as "criminals." IND. CODE § 31-6-3-5 (1982) provides:

> (a) A child may not be charged with or convicted of a crime . . . unless he has been waived to a court having criminal jurisdiction.
>
> (b) A child may not he considered a criminal by reason of an adjudication in a juvenile court nor may such an adjudication be considered a conviction of a crime. Such an adjudication does not impose any civil disability imposed by conviction of a crime.
>
> (c) A child's contact with the juvenile justice system does not disqualify him from any governmental application, examination, or appointment.

child under the age of fourteen would not have been prohibited from seeking punitive damages. Such victims however, *would* have been precluded from requesting punitive relief from an adult under the same circumstances. Similarly, an individual deliberately injured by a defendant of unsound mind could have conceivably recovered a punitive damages award because such defendant under Indiana law was liable for his torts, but immune from criminal prosecution.[56] A similar award, however, would have been denied to a victim of a wrongdoing committed by one adjudged competent. These situations illustrate incongruities that the *Taber* court did not foresee.

C. Indiana Courts Have Nonetheless Disfavored the Limitations of Taber

Following the *Taber* decision, Indiana courts produced distorted constructions of the rule in an endeavor to escape its application. For example, although the judiciary had consistently denied punitive damages where the defendant was subject to a criminal prosecution for the same act, compensatory damages were expanded liberally in these early cases to include all injuries, both mental and physical, directly stemming from the defendant's wrongdoing.[57] Included within this seemingly limitless category were such elements as loss of reputation, bodily pain, humiliation, and loss of peace of mind and individual happiness.[58] More recent opinions carved out various exceptions to the rule in attempts to counteract its often inequitable results.[59] Several such holdings openly called

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[56]IND. CODE § 35-41-3-6 provides:

> (a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of law.
>
> (b) "Mental disease or defect" does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

For cases on point, see Buzynski v. Oliver, 538 F.2d 6 (1st Cir.), *cert. denied,* 429 U.S. 984 (1976); Law v. State, 406 N.E.2d 1185 (Ind. 1980); Hill v. State, 252 Ind. 601, 251 N.E.2d 29 (1969); Woods v. Brown, 93 Ind. 164 (1883).

[57]Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381, 388 (1882) (jury not restricted to the pecuniary loss of the sufferer).

[58]*See* Wolf v. Trinkle, 103 Ind. 355, 3 N.E. 110 (1885); Stewart v. Maddox, 63 Ind. 51 (1878).

[59]*See, e.g.*, Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966) (punitive damages allowed for an assault where statute of limitations had run on the criminal prosecution of the offense; double jeopardy principles would not be violated where threat of criminal prosecution ceased to exist). *Compare* Nicholson's Mobile Home Sales, Inc. v. Schramm, 164 Ind. App. 598, 330 N.E.2d 785 (1975) (defendant whose actions were in complete disregard of the consequences was assessed punitive damages despite probable criminal prosecution for the same conduct) *and* True Temper Corp. v. Moore, 157 Ind. App. 142, 299 N.E.2d 844 (1973) (punitive damages assessed despite criminal prosecution where defendant exhibited a heedless disregard of the consequences) *with* Glissman v. Kutt, 175 Ind. App. 493, 372 N.E.2d 1188 (1978)(rejecting the heedless disregard exception as contrary to the principles of double jeopardy).

for total abrogation of the *Taber* rule by either legislative action or judicial pronouncement.[60]

In response to this mounting judicial pressure to correct the inequitable situations created by the *Taber* rule, the legislature enacted the new punitive damages statute in 1984. One of the legislature's considerations in enacting the new statute may have been a desire to substitute private for public law enforcement as a means to effect a more efficient level of compliance.[61] Despite its motives, by exposing the defendant to both criminal and civil liability upon the commission of certain crimes in Indiana, the legislature has given crime victims an opportunity to seek greater relief.

IV. The Scope of the New Statute in Light of Practices Adopted by Other States

A. Possible Retroactivity of the New Statute

The new punitive damages statute became effective on September 1, 1984.[62] One issue yet to be decided is the statute's retroactive application to crimes committed before its effective date.

In determining whether a statute is to operate retroactively, Indiana courts are likely to look first for specific language in the act which would indicate that the legislature intended to give it retroactive application.[63] In Indiana, statutes are to be construed and applied prospectively, unless a contrary intent is manifested in clear and unambiguous terms.[64] Therefore, without unmistakable language sanctioning retroactivity, courts will presume that the new statute is to be given prospective effect only.[65] This presumption may be rebutted, however, where re-

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[60]*See, e.g.*, McCarty v. Sparks, 180 Ind. App. 251, 388 N.E.2d 296 (1979); Smith v. Mills, 179 Ind. App. 459, 385 N.E.2d 1205 (1979) (rule ripe for reconsideration).

[61]*See generally* Ellis, *supra* note 22, at 1-9. The value of punitive damages as an effective deterrent against a culpable corporate defendant in a products liability action was acknowledged in Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) where the court stated:

> It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of mass produced defective products that punitive damages must be of sufficient amount to discourage such practices.

Id. at 820, 174 Cal. Rptr. at 389.

[62]Act of Feb. 29, 1984, Pub. L. No. 172, 1984 Ind. Acts 1462 (codified at Ind. Code § 34-4-30-2).

[63]*See* State *ex rel.* Uzelac v. Lake Criminal Ct., 247 Ind. 87, 91, 212 N.E.2d 21, 22 (1965) (application of a new criminal statute requiring that criminal proceedings be brought against the accused within six months from the initial charges was expressly limited to arrests made on or after the effective date).

[64]*Id.* at 24.

[65]*See, e.g.*, Shelton v. State, 181 Ind. App. 50, 390 N.E.2d 1048 (1979) (criminal sentencing provision not retroactive).

troactivity would further a legislative purpose, or where the statute would not impose a new duty or create a new obligation, or attach a new disability with respect to transactions already past.[66]

Indiana's new statute contains no language, explicit or otherwise, that the act shall apply retroactively. Additionally, the statute increases the potential liability to be borne by the defendant and hence, attaches a new disability to past acts. Thus, from a strict construction of the statute and without further analysis it would appear that acts punishable as crimes committed before September 1, 1984, will not subject wrongdoers to civil actions for punitive damages. Strong public policy reasons exist, however, which would favor retroactive application of the new statute.

These public policy reasons were outlined by the California Supreme Court in *Taylor v. Superior Court*.[67] In *Taylor*, the California Supreme Court held that an accident victim who had suffered personal injury as a result of another's drunk driving could sue that person for punitive damages.[68] The court reasoned that because drunk drivers were the cause of many serious accidents, the threat of a punitive damages award might operate to deter such similar conduct in the future.[69]

The California Supreme Court had the opportunity to determine the retroactivity of the rule announced in *Taylor* in *Peterson v. Superior Court*.[70] The plaintiff in *Peterson* was injured by the reckless driving of an intoxicated driver before *Taylor* was decided. The plaintiff subsequently filed suit against the driver and attempted to amend his complaint to include an additional claim for punitive damages. The lower court refused his motion for leave to amend, and he appealed that decision to the California Supreme Court.[71] In entertaining the plaintiff's appeal, the court relied on the decision of the United States Supreme Court in *Stovall v. Denno*[72] for guidance in its retroactivity analysis.

In *Stovall*, the Court was asked to determine whether a constitutional rule of criminal procedure issued that same day could be applied ret-

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[66]*See* Standard Accident Ins. Co. v. Miller, 170 F.2d 495 (7th Cir. 1948); Stewart v. Marson Constr. Corp., 244 Ind. 134, 191 N.E.2d 320 (1963); *see also* Malone v. Conner, 135 Ind. App. 167, 189 N.E.2d 590 (1963). In *Malone*, the court held that an intervening rule giving an administrator of an estate a cause of action for reasonable medical expenses incurred by the decedent from the date of his injuries caused by the defendant until the date of his death should not be retroactively applied. A retroactive statute must not take away an existing right *or give a new right*, but can only provide a new remedy to enforce an existing right.
Id. at 170, 189 N.E.2d at 591.

[67]24 Cal.3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).

[68]*Id.*

[69]*Id.* at 900, 598 P.2d at 858-59, 157 Cal. Rptr. at 698.

[70]31 Cal.3d 147, 642 P.2d 1035, 181 Cal. Rptr. 784 (1982).

[71]*Id.* at 147, 642 P.2d at 1306, 181 Cal. Rptr. at 784.

[72]388 U.S. 293 (1967).

roactively.[73] In deciding that issue, the Court examined "(a) the purpose to be served by the new standards (in this case, a rule of criminal procedure), (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[74] After considering these factors, the Court held that because retroactivity would have a devastating impact upon the administration of criminal law, the new rule should only be applicable to events occurring after that date.[75]

The *Peterson* court applied the same criteria and held that the punitive damages rule announced in *Taylor* could be retroactively applied.[76] Although *Stovall* involved a criminal rule, the court in *Peterson* noted that civil rules of retroactivity were not inconsistent with those present in criminal decisions, both being dependent upon principles of public policy and fairness. "Public policy considerations include the purpose to be served by the new rule, and the effect on the administration of justice of retroactive application. Considerations of fairness would measure the reliance on the old standards by the parties or others similarly affected . . . ."[77]

In *Peterson*, the defendant argued against retroactivity, claiming that the rule would not have a deterrent effect and would instead inflict hardship upon litigants who had relied upon prior law.[78] The court found both arguments unpersuasive. Instead, the court held that the change in the law had not been unforeseeable and that retroactivity would "create a greater, more immediate deterrent impact on the consciousness of the driving public . . . ."[79]

In resolving the issue of retroactivity, the *Peterson* court balanced the potential harm caused by a retroactive application of the rule against a determination of whether any discernible public purpose justified its effects.[80] In making its determination, the court accorded great weight to the foreseeability of the change in the law.[81] Indiana's new punitive

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[73]*Id.* at 296. In *Stovall*, the petitioner, without benefit of counsel, was identified in a lineup by a woman from her hospital bed the day after she underwent life-saving surgery. The petitioner was convicted of murder and attempted murder and sentenced to death. In seeking habeas corpus, the petitioner argued for retroactive application of a rule decided that same day in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), requiring the presence of counsel at lineups.

[74]388 U.S. at 297.

[75]*Id.* at 300.

[76]31 Cal.3d at 164, 642 P.2d at 1315, 181 Cal. Rptr. at 794 (1982). *See generally* Note, *Retroactivity of Punitive Damages Rule in Drunk Driving Cases:* Peterson v. Superior Court, 10 PEPPERDINE L. REV. 232 (1982)

[77]31 Cal.3d at 153, 642 P.2d at 1307, 181 Cal. Rptr. at 786-87.

[78]*Id.* at 156, 642 P.2d at 1308, 181 Cal. Rptr. at 788.

[79]*Id.* at 164, 642 P.2d at 1315, 181 Cal. Rptr. at 794.

[80]The balancing approach used by the *Peterson* court was advocated in DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 OHIO N.U.L. REV. 253, 272-75 (1983).

[81]31 Cal.3d at 153, 642 P.2d at 1307-08, 181 Cal. Rptr. at 786-87 (citing Neel v. Magana, Olney, Cuthcurt & Gelfand, 6 Cal.3d 176, 193, 491 P.2d 421, 432, 98 Cal. Rptr. 837, 848 (1971)).

damages statute was similarly not unexpected. For many years, Indiana's minority position has been criticized and condemned by both commentators and the Indiana judiciary.[82] Arguably, conformity to the majority position was only a matter of time.

Greater civil accountability might be construed to be in the public interest. Not only would retroactive application deter the wrongdoer and others from repeating such antisocial conduct, but it would also reimburse the crime victim for any uncompensated financial loss. Thus, in balancing considerations of fairness and public policy against any harm which might befall a defendant by way of increasing his potential liability, the scales weigh in favor of retroactivity. Even though retroactive application of the new statute might add to civil court dockets, it is likely that many victims of pre-act crimes have already sought compensatory relief, in which case an additional claim for punitive damages would not necessitate an extra court date. Whether or not the courts rule in favor of retroactivity, the new statute will doubtless have a far-reaching effect on the types of criminal activity within its purview.[83]

B. Criminal Activity Likely to Be Affected by the New Statute

The following discussion surveys the classes of criminal activities for which punitive damages may now be awarded under the new statute. This survey is not intended to be exhaustive of all conceivable areas where punitive damages might be justified. Instead, the more common situations where the defense of criminal exposure has previously been invoked to bar a claim for punitive damages have been selected. Because the defendant's state of mind, rather than the particular tort or crime committed, is determinative of a punitive damages award,[84] the litigant who decides to pursue punitive relief should probably be guided more by the degree of culpability common to all punitive damages cases than by analysis of prior punitive damages awards under any particular factual situation.

1. *Offenses Against the Person.*—From a very early date, many jurisdictions acknowledged the propriety of awarding punitive damages in cases involving violent crimes against the person, such as assault and

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[82]*See supra* notes 59-60 and accompanying text.

[83]To date, no court has ruled on the possible retroactive application of the new punitive damages statute. After the passage of the new statute but before its effective date, the case of *Gomez v. Adams*, 462 N.E.2d 212 (Ind. App. 1984) was decided. In *Gomez*, the Indiana Court of Appeals denied a punitive damages award on the ground that the defendant bore potential criminal liability for the same conduct complained of in the civil suit. The court did note in its decision the passage of the new statute removing possible criminal sanctions as a defense in an action for punitive damages, but declined to speculate as to its possible retroactive application. *Id.* at 227 n.12.

[84]*See supra* notes 20-25 and accompanying text.

battery,[85] sexual assault,[86] and homicide.[87] As the Oregon Supreme Court emphasized:

> We are unable to understand why the additional determent of punitive damages is considered unreasonable. Not only the criminal justice system but every law-abiding citizen is concerned with the increasing crime rate. If we are concerned with the types of acts which may subject a defendant to a criminal charge and civil liability such as violent crimes against the person, as in this case, we see nothing wrong with the additional determent of the allowance of punitive damages.[88]

In contrast, the Indiana Supreme Court refused to award punitive damages to the victim of an assault in *Taber v. Hutson*,[89] as did the Indiana Court of Appeals in *Borkenstein v. Schrack*.[90] Each court based its decision on the fact that the offense was punishable criminally.[91] In courts which distinguish the separate functions of public and private redress,[92] punitive damages are awarded despite the presence or absence of a previous criminal conviction and accompanying prison sentence imposed for the offense committed.[93] Some jurisdictions have even refused to weigh the punitive effect of a criminal fine in determining civil

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[85]*See* McNamara v. St. Louis Transit Co., 182 Mo. 676, 81 S.W. 880 (1904); Roberts v. Mason, 10 Ohio St. 278 (1957); Brown v. Swineford, 44 Wis. 282 (1878) (punitive damages awarded an assault victim, albeit not without criticism of the doctrine); *see also* Shelley v. Clark, 267 Ala. 621, 103 So.2d 743 (1958).

[86]*See* Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917). Indiana's present rape statute is codified at IND. CODE § 35-42-4-1 (1982).

[87]*See* Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (1945).

[88]Roshak v. Leathers, 277 Or. 207, 212, 560 P.2d 275, 278 (1977) (defendant criminally charged with attempted murder and convicted of the crime of assault in the third degree).

[89]5 Ind. at 322, 327.

[90]31 Ind. App. 220, 67 N.E. 547 (1903).

[91]Indiana's current assault and battery statute punishes the offense as either a misdemeanor or a felony, depending upon the attendant circumstances. IND. CODE § 35-42-2-1 (Supp. 1985) reads:

> A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
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> (1) [a] Class A misdemeanor if it results in bodily injury to any other person, or if it is committed against a law enforcement officer or against a person summoned and directed by the officer while the officer is engaged in the execution of his official duty;
>
> (2) [a] Class D felony if it results in bodily injury to . . . such an officer or person summoned and directed; . . . and
>
> (3) [a] Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon.

[92]*See supra* notes 39-41 and accompanying text.

[93]*See, e.g.*, Roberts v. Mason, 10 Ohio St. 278 (1857); Stark v. Epler, 59 Or. 262, 117 P. 276 (1911).

damages.[94] Thus, because federal courts[95] and most state courts recognize the importance of punitive damages as both de facto compensatory relief for the plaintiff,[96] and a retaliatory tool of society it is highly probable that Indiana will also ignore whether or not criminal punishment has been imposed in gauging a punitive award, at least with respect to claims involving injury to the person.

The following cases illustrate the many factual circumstances which have resulted in punitive damages awards. In each of these cases, the act complained of was one that was also criminally punishable.

In *Jones v. Fisher*,[97] the Wisconsin Supreme Court allowed punitive damages for an assault and battery where defendants had forcibly extracted a dental plate from the plaintiff's mouth. Although the defendants were entitled to the property as security for repayment of a loan, the court seemed to object to the unreasonable methods employed by the defendants to recover the plate.[98]

An award of punitive damages was upheld for assault with intent to murder by the Oregon Supreme Court in *Koshak v. Leathers*.[99] The plaintiff, a law enforcement officer, instituted civil proceedings against the defendants for injuries he received after the defendants violently protested traffic violation charges.[100] In permitting punitive damages, the court was unmoved by the fact that the defendants had already been convicted for assault in the third degree.[101]

The plaintiff received punitive relief in the Pennsylvania Supreme Court case of *May v. Baron*.[102] In *May*, the defendant demanded payment from the plaintiff for a debt owing. When the plaintiff refused to tender payment, the defendant kicked him repeatedly, eventually rendering him unconscious.[103]

As a precondition to considering punitive relief, all three courts either required the plaintiff to offer direct proof of malice or inferred malice from the nature of the act committed.[104] Furthermore, all instances of offenses against the person were intentional torts. Thus it appears

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[94]*E.g.*, Bundy v. Maginess, 76 Cal. 532, 18 P. 668 (1888); Hartman v. Logan, 203 S.W. 61 (Tex. Civ. App. 1918).

[95]Punitive awards have often been upheld by federal courts in assault cases. *See, e.g.*, Shimman v. Frank, 625 F.2d 80 (6th Cir.), *reh'g denied* (1980); King v. Nixon, 207 F.2d 41 (D.C. Cir. 1953) (per curiam).

[96]In addition to the deterrence and punishment aspects of punitive damages, the award compensates the plaintiff for litigation costs and counsel fees. *See* W. PROSSER, *supra* note 12, at 11.

[97]42 Wis.2d 209, 166 N.W.2d 175 (1969).

[98]*Id.* at 217, 177 N.W.2d at 180.

[99]277 Or. 207, 560 P.2d 275 (1977).

[100]*Id.* at 209, 560 P.2d at 276.

[101]*Id.*

[102]329 Pa. 65, 196 A. 866 (1938).

[103]*Id.* at 65, 196 A. at 866.

[104]277 Or. at 209, 560 P.2d at 276; 329 Pa. at 65, 196 A. at 866; 42 Wis. 2d at 218, 166 N.W.2d at 180.

that courts are influenced by aggravated or humiliating circumstances when attempting to distinguish those offenses which justify a punitive award from their less egregious counterparts.

2. *Offenses Against Property Rights.*—Classes of criminal activity affecting property rights now subject to punitive awards under the new statute include arson,[105] criminal mischief,[106] burglary,[107] trespass,[108] theft,[109] conversion[110] and forgery.[111] Other jurisdictions have granted punitive relief on several of these grounds.

For example, a punitive damages award was upheld by the South Carolina Supreme Court in *St. Charles Mercantile Co. v. Armour & Co.*[112] In *St. Charles Mercantile*, the defendant's agent had altered the plaintiff's postdated check and presented it to the bank for immediate payment. He was subsequently convicted for forgery and his employer was held vicariously liable for punitive damages.[113] Because the agent's willful and malicious act had resulted in harm to the plaintiff's credit and commercial reputation, the civil award was upheld, notwithstanding the prior criminal conviction. "The violation of a criminal law, which results in any actual damage to a person, is entirely sufficient as the foundation for punitive damages."[114]

Punitive damages were levied against the defendant for conversion in the Kentucky case of *Hensley v. Paul Miller Ford, Inc.*[115] The court held that such damages were recoverable for gross neglect and disregard for the plaintiff's rights where the defendant car dealer sold the plaintiff's car, along with certain private property within the car, in violation of a prior mutual understanding and without the plaintiff's permission.[116]

Prior to the enactment of the new punitive damages statute in Indiana, a person suffering a pecuniary loss as a consequence of the defendant's interference with his property rights could bring a claim for an amount equal to three times his actual damages.[117] The new act now

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[105]IND. CODE § 35-43-1-1 (1982).

[106]IND. CODE § 35-43-1-2 (1982).

[107]IND. CODE § 35-43-2-1 (1982).

[108]IND. CODE § 35-43-2-2 (1982). *See* Skufakiss v. Duray, 85 Ind. App. 426, 154 N.E. 289 (1926) (prejudicial error to instruct jury to assess punitive damages if the trespass committed was found to be wanton and willful). *But see* Cosgriff v. Miller, 10 Wyo. 190, 68 P. 206 (1902).

[109]IND. CODE § 35-43-4-2 (1982).

[110]IND. CODE § 35-43-4-3 (1982).

[111]IND. CODE § 35-43-5-2 (1982).

[112]156 S.C. 397, 153 S.E. 473 (1930).

[113]*Id.* at 399, 153 S.E. at 474.

[114]*Id.* at 406, 153 S.E. at 478.

[115]508 S.W.2d 759 (Ky. Ct. App. 1974).

[116]*Id.* at 762.

[117]An amount "equal to" has been amended to read an amount "not to exceed" three times his actual damages. *See* Act of Feb. 29, 1984, Pub. L. No. 172 § 1, 1984 Ind. Acts 1462, (amending IND. CODE § 34-4-30-1) (1982)).

permits a choice between punitive or treble damages, but recovery of both is expressly precluded.[118]

Neither the legislature nor the judiciary has yet indicated at what stage of the litigation the plaintiff must choose between the two statutory remedies. There is nothing to prohibit, however, a request for treble damages or alternatively, punitive damages, recovery being limited to the greater of the two. Such a complaint would not be violative of the Indiana trial rule governing the general rules of pleading.[119]

Furthermore, the doctrine of election of remedies would not appear to compel a litigant to choose at the pleadings stage between treble and punitive damages for injury to property rights. The doctrine of election of remedies applies only when there are two or more coexisting, but inconsistent, remedies available to the litigant, and the choice and uninterrupted prosecution of one would preclude pursuit of all others.[120] Indiana courts have generally applied this definition to claims involving conflicting theories of action. For example, a plaintiff who has entered into a compromise agreement of a tort claim and who, upon breach of the compromise agreement, chooses to prosecute the original tort action to final judgment is barred under the doctrine from also maintaining an action for breach of the compromise agreement.[121] The plaintiff may treat the compromise agreement as rescinded and sue on the original tort or he may sue on the contract; however, he may not prosecute one of the remedies to judgment and subsequently sue on the other.[122]

In contrast, what is presented in the statute is not a choice between differing courses of action, but between two statutory awards for a single property claim. The choice between distinct statutory awards has been found to be within the province of the jury. In *Curtis Publishing Co. v. Butts*,[123] the Fifth Circuit held that under Georgia law,[124] the jury was responsible for determining whether punitive damages were to be awarded as a deterrent to the wrongdoer or for compensation for the

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[118]*See* Act of Feb. 29, 1984, Pub. L. No. 172 § 2, 1984 Ind. Acts 1462 (codified at IND. CODE § 34-4-30-2 (Supp. 1985)).

[119]IND. R. TR. P. 8(A) provides:

(A) *Claims for relief.* To state a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, a pleading must contain:

(1) A short and plain statement of the claim showing that the pleader is entitled to relief; and

(2) A demand for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

[120]*See* New York Cent. R.R. Co. v. Churchill, 140 Ind. App. 426, 218 N.E.2d 372 (1966). The doctrine only applies "where a party has chosen one remedy and later pursues another remedy which is repugnant to or inconsistent with the remedy selected." *Id.* at 429, 218 N.E.2d at 374.

[121]Burrus v. American Casualty Co., 518 F.2d 1267, 1269 (7th Cir. 1975).

[122]*Id.* at 1269.

[123]351 F.2d 702 (5th Cir. 1965).

[124]*See* GA. CODE § 51-12-5 (1982).

plaintiff's wounded feelings.[125] Punitive damages satisfying either objective were allowed by statute, although recovery for both was expressly forbidden.[126] Conceivably, the methods used to calculate punitive damage awards under either purpose may differ, resulting in unequal figures. But because the duty of determining the final amount to be awarded as well as the theory under which such relief is given is within the jury's discretion, the litigant is not faced with having to choose between the two remedies in his complaint.

The new Indiana punitive damages statute fails to distinguish the purposes for which punitive relief is granted. It does, however, provide for two different remedies from which the jury, and not the plaintiff, could competently choose as an appropriate foundation for recovery.

If the litigant chooses one form of relief over the other prior to final adjudication, certain factors should be weighed in the selection process. In many cases, a punitive award may be more advantageous than recovery of treble damages. For instance, in a suit for conversion where the article unlawfully taken is of little value, relief in the form of treble damages may be much lower than a punitive damages award designed to reprimand the defendant for his acts and deter him from repeating the same conduct in the future.[127]

3. *Corporate Offenses and Securities Violations.*—In Indiana, a corporation, partnership, or unincorporated association can be criminally prosecuted for acts committed by an agent acting within the scope of his authority.[128] A corporate entity, however, unlike an individual, cannot be deprived of liberty upon conviction. Thus, punishment is effected through the imposition of a criminal fine, the size of which is limited by statute.[129] However, fines which are negligible when compared to the gross earnings and profit-generating capacity of a large-scale operation often fail to achieve the objective of deterrence[130] or to impair seriously

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[125]351 F.2d at 717-18.

[126]*Id.*

[127]*E.g.*, Price v. Ford Motor Credit Co., 530 S.W.2d 249 (Mo. Ct. App. 1975) (assessing $25,000 in punitive damages with $600 in actual damages for the wrongful possession of a debtor's automobile; treble damages award would have been a fraction of the punitive relief actually given).

[128]IND. CODE § 35-41-2-3 (1982).

[129]IND. CODE §§ 35-50-2-4 to -7.

[130]*See* McLemore, *supra* note 43, at 88. Recent concern with underpunishment of corporations surfaced in the prosecution of the Ford Motor Company in *State v. Ford Motor Co.*, No. 11431 (Pulaski County Cir. Ct. Mar. 13, 1980) (*noted in* McLemore, *supra* note 43, at 88), on charges of reckless homicide, a Class C felony. IND. CODE § 35-42-1-5 (1982). Criminal charges followed after three teenagers were killed when the gas tank of their Pinto exploded after being hit from behind. Conviction was sought on the ground that Ford management was aware of the gas tank's design defects, but marketed the product despite this knowledge. Had Ford not won an acquittal, the maximum fine levied would have been limited to $10,000. IND. CODE § 35-50-2-6.

With Indiana's new punitive damages statute, adequate punishment of corporations for criminal offenses may be less difficult to achieve. In reference to the *Ford* case, the requisite finding of malice might easily have been inferred from management's knowledge of the vulnerability of the tank to rear-end collisions and the subsequent conscious decision to incorporate the tank into the car's design. Such a finding was made in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 757, 174 Cal. Rptr. 348 (1981) (strict products liability).

the financial interest of stockholders.[131] Furthermore, as one commentator has noted, pursuance of corporate criminal convictions not only encumbers the state treasury, contrary to the public's best interests, but also commands much effort and attention, impeding the state's ability to prosecute other meritorious cases.[132] Under the new statute, a punitive damages claim sought through private initiative will further the goals of punishment and deterrence while averting the drawbacks of a state prosecution.

The new punitive damages statute may also affect securities violators, as illustrated by the Colorado case of *E.F. Hutton & Co. v. Anderson*.[133] A securities brokerage instituted civil proceedings against several options buyers whose checks had been returned for insufficient funds. Although the defendants had already received criminal convictions on separate counts of theft and deceptive securities practices, the court granted plaintiff's request for punitive damages. The court reasoned that the added civil penalty did not violate double jeopardy principles, but was necessary to punish the defendants and compensate the plaintiff for the purchasing losses sustained.[134]

Under Indiana law, the unlawful sale or procurement of securities is punishable both criminally and civilly, with civil liability limited to recovery of consideration paid or accepted, together with interest and attorney's fees.[135] Unless Indiana's securities statute is construed to exclude all other forms of civil relief, the introduction of punitive damages as an added form of punishment may further assist both state and national efforts to curb fraudulent securities practices.

4. *Driving While Intoxicated.*—Attention to the frequent underpunishment of drunk drivers is highlighted by the legislature's recent attempts to stiffen penalties against first-time and habitual offenders.[136] With the passage of the new punitive damages statute, the arsenal of judicial weapons against the drunk driver will be even greater. Unlike the new repeat offender provision for drunk driving convictions,[137] however, the application of the new punitive damages statute to personal

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[131]Impairing the financial interests of innocent shareholders is arguably not a goal in assessing criminal fines against corporate assets. Nevertheless, because corporations can only act through their agents and servants, the alternative would leave many instances of criminal conduct unpunished. *See* H. BALLANTINE, BALLANTINE ON CORPORATIONS §§ 113-14 (rev. ed. 1946).

[132]*See* McLemore, *supra* note 43, at 88.

[133]42 Colo. App. 497, 596 P.2d 413 (1979).

[134]*Id.* at 501, 596 P.2d at 415.

[135]*See* IND. CODE § 32-2-1-18.1 (1982) (securities violations punishable as a Class C felony); *see also* IND. CODE § 23-2-1-19 (1982) (deceptive practices generally and civil remedies therefor).

[136]*See* IND. CODE §§ 9-11-2-1, -4, -5 (Supp. 1985) (driving while intoxicated is punishable as a misdemeanor upon the showing of a blood-alcohol level of .10% or more, but elevated to Class C and D felony status if the crime results in serious bodily injury or death); *see also* IND. CODE § 9-11-2-3 (repeat offender provision).

[137]IND. CODE § 9-11-2-3 (Supp. 1985).

injury claims against drunk drivers will likely escape constitutional attack. To date, the application of similar punitive damages statutes in other states to personal injury claims has not been challenged on constitutional grounds.[138]

Notwithstanding the disqualification of criminal prosecution as a defense to a punitive damages claim, Indiana courts must still decide whether evidence of intoxication is sufficient to impute malice.[139] Many jurisdictions, focusing upon the defendant's conduct rather than upon his actual state of mind, have inferred malice and a general disregard for the safety of persons and property solely from the voluntary acts of drinking and driving.[140] In furthering an already strong public policy decision against drunk driving, the Second Circuit Court of Appeals upheld a punitive damages award without first deciding whether evidence of driving while intoxicated was sufficient in itself to prove willful and wanton conduct.[141]

It remains to be seen whether Indiana courts will impute malice for drunken driving in itself; however, it would unquestionably be in the public's best interest, and in the interest of effective law enforcement, to increase civil penalties imposed upon the guilty defendant, especially

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[138]*See supra* note 10 (listing similar statutes in other jurisdictions).

[139]Mere negligence is an insufficient basis for a punitive damages award. The plaintiff must establish malice to recover punitive damages. *See supra* note 22 and accompanying text.

[140]*See* Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948); Peterson v. Superior Ct., 31 Cal.3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982); Ingram v. Pettit, 340 So.2d 922 (Fla. 1976) (intentional infliction of harm or recklessness which is the result of an intentional act authorized punishment which may deter future harm); Baker v. Marcus, 201 Va. 905, 114 S.W.2d 617 (1960). *But see* Smith v. Chapman, 115 Ariz. 211, 564 P.2d 900 (1977) (intoxication plus negligent driving does not, per se, equal reckless disregard for the safety and rights of others); Detling v. Chockley, 70 Ohio St. 2d 134, 436 N.E.2d 208 (1982) (although punitive damages are allowed for criminal activity, evidence of driving while intoxicated alone is insufficient to impute malice); Ayala v. Farmers Mut. Auto. Ins. Co., 272 Wis. 629, 76 N.W.2d 563 (1956). *Cf.* Thompson v. Pickle, 136 Ind. App. 139, 191 N.E.2d 53 (1963) (punitive damages denied, but willful and wanton misconduct present where evidence showed that the defendant was intoxicated and drove seventy m.p.h. in a thirty m.p.h. zone). The merits of assessing punitive damages as an added deterrent against convicted drunk drivers were discussed in *Harrell v. Ames*, 265 Or. 183, 508 P.2d 211 (1973):

> However, in the absence of a showing of substantial evidence to the contrary, we are not prepared to hold that law enforcement officials and courts, who have a heavy responsibility in this area, are wrong in their present apparent assumption that both criminal penalties and awards of punitive damages may have at least some deterrent effect in dealing with this serious problem.

Id. at 190, 508 P.2d at 215. For a general discussion of the propriety of awarding punitive damages in drunk driving cases, see Note, Detling v. Chockley: *Punitive Damages and the Drunk Driver - An Untimely Decision*, 12 CAP. U.L. REV. 271 (1982); Note, *Punitive Damages and the Drunk Driver*, 8 *Pepperdine L. Rev.* 117 (1980).

[141]Brooks v. Wootton, 355 F.2d 177 (2d Cir. 1966).

in light of the substantial number of traffic fatalities attributable each year to drunk drivers.[142]

5. *Other Offenses.*—Certain types of offenses generally escape criminal prosecution, either as a result of the state directing its prosecutorial efforts to more egregious crimes or simply because of the comparatively benign nature of the criminally punishable activity itself. One example is bigamy.[143] In *Morris v. MacNab*,[144] a New Jersey court awarded the plaintiff punitive damages in an action for fraudulent inducement to enter a bigamous marriage, even though the defendant had previously been convicted on a bigamy charge.[145] The court stated, "[I]t has been pointed out that the inclusion of punitive damages in the plaintiff's tort judgment, which is allowable for the private wrong to the individual rather than the accompanying wrong to the public, may effectively supplement the criminal law in punishing the defendant."[146]

More noteworthy offenses which are criminally punishable, and therefore subject to the purview of the new punitive damages statute, include civil rights violations[147] and criminal confinement.[148] With respect to civil rights violations, the propriety of a punitive damages award was addressed by the United States District Court for the Northern District of Iowa in *Amos v. Prom, Inc.*[149] In *Amos*, a black plaintiff sued a corporate defendant for its alleged willful and malicious refusal, in violation of the Iowa Civil Rights statute, to admit him into a ballroom operated by the corporation. The court, in overruling the defendant's motion to dismiss for lack of jurisdiction, stated in dicta that punitive damages would be allowable for such reprehensible conduct despite coexistent criminal liability.[150]

Indiana's Civil Rights statute states:

> A person who knowingly or intentionally denies to another person, because of color, creed, handicap, national origin, race, religion, or sex, the full and equal use of the services, facilities, or goods in:
>
> (1) an establishment that caters or offers its services, facilities or goods to the general public; or
>
> (2) a housing project owned or subsidized by a governmental entity;
>
> commits a civil rights violation, a Class B misdemeanor.[151]

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[142]PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 1 (1983) (between 1973 and 1983, over 250,000 were killed in alcohol-related crashes; over 50% of all highway deaths involve the use of alcohol).

[143]*See* IND. CODE § 35-46-1-2 (1982).

[144]25 N.J. 271, 135 A.2d 657 (1957).

[145]*Id.* at 279, 135 A.2d at 662-63.

[146]*Id.* at 280, 135 A.2d at 663.

[147]*See* IND. CODE § 35-46-2-1 (1982) (Class B misdemeanor).

[148]IND. CODE § 35-42-3-3.

[149]115 F. Supp. 127 (N.D. Iowa 1953).

[150]*Id.* at 134.

[151]*See* IND. CODE § 35-46-2-1 (1982).

Before the passage of the new punitive damages statute, an individual or establishment could selectively discriminate in furnishing goods and services in Indiana, without the fear of being civilly liable for anything more than any actual damages sustained. Such liability in many instances would be an ineffective deterrent in light of the fact that a plaintiff's pecuniary loss resulting from the unjust discrimination is generally inconsequential.[152] Thus, because the principal justification for punitive damages is deterrence,[153] imposition of punitive awards will likely encourage strict compliance with state and federal anti-discrimination laws.[154]

V. Potential Obstacles to Recovering Punitive Damages for Criminal Acts

A. Actions by the Legislature

Judicial decisions invoking the *Taber* safeguard against double jeopardy have done so in reliance upon the rule's underlying principles of fairness in prescribing punishment for the defendant.[155] Notwithstanding abrogation of the rule, the legislature has attempted to preserve this objective by increasing the plaintiff's burden of proof in a punitive damages action from a mere preponderance of the evidence to clear and convincing proof.[156] Although different in form from criminal penalties, the consequences of civil liability are unmistakably penal in nature.[157] Despite this similarity in effect, and the potential magnitude of a punitive award, the defendant in a civil action for punitive damages is not afforded the same safeguards which accompany the criminal trial and protect the criminal defendant.[158] In criminal courts, the state is required to establish

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[152]*See* Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 367 (S.D. Cal. 1961).

[153]*See* Note, *Criminal Safeguards, supra* note 33.

[154]*See, e.g.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (1976).

[155]*See, e.g.*, Glissman v. Rutt, 175 Ind. App. 493, 497, 372 N.E.2d 1188, 1191 (1978).

[156]*See* Act of Feb. 29, 1984, Pub. L. No. 172, 1984 Ind. Acts 1462-63 (codified at Ind. Code §§ 34-4-34-1, -2 (Supp. 1985)) which reads:

> (1) This chapter applies to all cases in which a party requests the recovery of punitive damages in a civil action.
>
> (2) Before a person may recover punitive damages in any civil action, that person must establish, by clear and convincing evidence, all of the facts that are relied upon by that person to support his recovery of punitive damages.

This higher standard of proof for punitive damages claims was first enunciated in *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982), where the court stated: "The stricter standard is utilized when fundamental rights are involved and the legal and social ramifications of the civil proceeding are serious." *Id.* at 32.

[157]*See* Note, *Criminal Safeguards, supra* note 33.

[158]*See id.*, at 430.

the defendant's guilt beyond a reasonable doubt,[159] while in civil proceedings the plaintiff must generally prove his case by a preponderance of the evidence.[160] By changing the civil evidentiary rule to require proof by clear and convincing evidence, the legislature has increased the plaintiff's burden of proof in accordance with the increase of possible consequences to the defendant.

B. Judicial Decisions

In addition to the increased burden of proof now borne by the plaintiff in a punitive damages action, Indiana case law furnishes an inherent safeguard against potential misuse of the statute. In actions for which punitive damages are sought, the defendant's financial condition is admissible in evidence as bearing upon the amount of punitive damages recoverable.[161] Such information is material in calculating the amount necessary to meet the punishment and deterrence functions of punitive damages. As one New York court stated, "[The] defendant's wealth . . . is only relevant with respect to what should be awarded to plaintiff as punishment to defendant and to deter defendant and others of similar mind from engaging in malicious acts."[162]

Although the introduction of the defendant's pecuniary resources has primarily been used as a plaintiff's weapon,[163] most courts also permit a punitive damages defendant to show evidence of his wealth in diminution of an award.[164] Tailoring punitive awards to the defendant's financial resources both preserves the laudable objectives of the *Taber* rule and protects against the possibilities for overpunishment long characteristic of the majority position. The defendant is sufficiently deterred,

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[159]C. McCormick, Evidence § 341, at 962 (3d ed. 1984).

[160]F. James and G. Hazard, Civil Procedure § 7.6, at 243 (2d ed. 1977).

[161]*See* Nate v. Galloway, 408 N.E.2d 1317 (Ind. Ct. App. 1980). In addition to the defendant's financial condition, the court in *Nate* considered the nature of the tort and the extent of the actual damages sustained in reviewing a punitive damages award. In light of the fact that the defendant owned three apartment buildings, a $3,500 punitive damages award was held not to be excessive. *Id.* at 1323. *See also* Chapin v. Tampoorlos, 325 Ill. App. 219, 59 N.E.2d 334 (1945); Joseph Schlitz Brewing Co. v. Central Beverage Co., Inc., 172 Ind. App. 81, 359 N.E.2d 566 (1977); Gierman v. Toman, 77 N.J. Super. 18, 185 A.2d 241 (1962).

[162]Rupert v. Sellers, 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975).

[163]This is especially true against large corporate defendants where assets and holdings information frequently contribute to large punitive damages awards. For an examination of jury verdicts in a corporate setting, see Belli, *Punitive Damages*, 13 Trial 40 (1977), where the author noted, "Courts and insurance companies hate punitives; juries and plaintiffs savor them. Judges are doing everything in their power to restrict them; plaintiffs are clamoring for them as the silver bullet that can hurt even the invulnerable corporate defendant."
Id. See also Silliman, *Punitive Damages Related to Multiple Litigation Against a Corporation*, 16 Fed'n Ins. Coun. Q. 91 (1966).

[164]*See* Grimshaw v. Ford Motor Co., 119 Ca.3d 757, 174 Cal. Rptr. 348 (1981) (trial court reduced a jury punitive damages award of $125 million to $3.5 million after considering evidence of the company's profit-generating capacity.)

yet is not confronted with a liability grossly disproportionate to the crime committed.

C. The "Supplemental Approach" to Punitive Damages

The objective of the *Taber* rule was merely to prevent the imposition of excessive or unwarranted punishment.[165] Despite misgivings relating to the rule's continued vitality in judicial decision making, Indiana courts have remained loyal to this doctrine for one hundred thirty years.[166] Although the recovery of punitive damages is no longer precluded by the possibility of criminal prosecution, it is unlikely that courts will now ignore the well-established concern for the rights of the defendant. Under the new statute, a defendant who is sufficiently punished at the criminal level may later be subject to punitive damages in a civil trial. This would overpunish the defendant and violate the spirit of the prohibition against double jeopardy.[167] A more consistent approach in confronting the double jeopardy concern would be to focus upon the effectiveness of the punishment actually given, rather than the number of sanctions to which the defendant may be subjected.[168]

The principle of this "supplemental approach," a term developed by Harvard University Professor Morris, has been adopted in several jurisdictions[169] and entails the reciprocal adjustment of both civil and criminal penalties.[170] Under this theory, double punishment is permitted

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[165]5 Ind. at 325-36.

[166]*See generally* Aldridge, *supra* note 46.

[167]"However, the subsidiary functions of exemplary damages — compensation and revenge — seem to justify making the award to the plaintiff even though it may be largely a windfall." Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 525 (1957).

[168]This suggestion was propounded in Note, *Double Jeopardy and the Rule Against Punitive Damages of* Taber v. Hutson, 13 IND. L. REV. 999, 1020 (1980).

[169]The "supplemental approach" provides that the factfinder should be allowed to consider criminal liability as one factor in determining whether a punitive damages award would serve a meaningful deterrent function. *See* Badostain v. Grazide, 115 Cal. 425, 47 P. 118 (1896) (assault and battery conviction); Hanover Ins. Co. v. Hayward, 464 A.2d 156 Me. (1983); Wirsing v. Smith, 222 Pa. 8, 70 A. 906 (1908) (prison sentence imposed following attempted murder conviction). The vast weight of authority, however, holds otherwise. *See, e.g.*, Irby v. Wilde, 155 Ala. 388, 46 So. 454 (1897); Edwards v. Wessinger, 65 S.C. 161, 43 S.E. 518 (1903) (evidence of a prior acquittal for the same act is inadmissible in the mitigation of damages) (overruled on other grounds); DuBois v. Roby, 84 Vt. 465, 80 A. 150 (1911). In *Hoadley v. Watson*, the court maintained,

> The fact that in a civil action founded on a criminal act, the guilty party had been compelled to pay exemplary damages to the party injured on account of the act, would be no bar to a prosecution in a criminal proceeding for the same act, nor to any part of the fine imposed by law upon such offenses. Neither should the liability to, nor the actual imposition of, a fine in a criminal proceeding, bar any portion of the liability in a civil action for the same act.

45 Vt. 289 (1873). *See also* Bannister v. Mitchell, 127 Va. 578, 104 S.E. 800 (1920) (award of punitive damages wholly uninfluenced by criminal sanctions imposed).

[170]Professor Morris contributed a thorough analysis respecting both the merits and the shortcomings of the supplemental approach in Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1195-97 (1931).

only when the first penalty fails to achieve the goals of adequate punishment and deterrence. Where the civil case precedes a criminal hearing, the jury remains free to assess damages without considering the possibility of criminal punishment.[171] If a criminal action is subsequently brought, any inadequacy in the money judgment may he remedied by the criminal court judge by imposing a longer jail term than he would have given the defendant had there not been a civil suit.[172] If an adjustment is not deemed necessary, the court may suspend sentences or impose minimum penalties if mandated by the evidence.[173]

If the defendant has been prosecuted prior to the civil proceeding, the jury should be apprised of all criminal sanctions levied against such defendant in order to adjust the civil punishment accordingly.[174] Because the legislature predetermines many criminal penalties without taking into account the specific circumstances of the unlawful act,[175] the jury would be able to tailor further punishment to redress the conduct of the particular culprit. To avoid the danger that the jury might misuse the information to assume guilt and inflict greater punitive damages,[176] the defendant's liability and punishment should be separately determined.[177] In such a bifurcated trial, the defendant's financial condition and prior criminal conviction would be withheld until after the defendant's liability has been established.

The major flaw with the supplemental approach relates to the burden of predicting what amount of punishment will best further the goals of punishment and deterrence.[178] This problem is particularly acute when an often inexperienced jury must decide the appropriateness of the penalties. Moreover, because no set standards exist by which a judge or a jury may accurately gauge the value of the plaintiff's emotional duress or loss of reputation, it would likewise be difficult "for them to determine the amount of punitive damages that would produce an efficient level of deterrence . . . ."[179]

The judiciary's enduring adherence to the *Taber* rule might indicate its willingness to implement the supplemental approach. Theoretically,

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[171]*See* Note, *Criminal Safeguards, supra* note 33, at 415.

[172]Better protection against double punishment lies with the criminal rather than the civil courts because the former have ample power of preventing any great injury from excessive punishment. For instance, if the complainant refuses to release his private injury, the court may, following conviction, either impose a merely nominal fine or stay proceedings until termination of the civil suit, and then govern itself accordingly in the final determination of punishment. *See* Cook v. Ellis, 6 Hill 466 (1884).

[173]*Id.*

[174]*See* Morris, *supra* note 170, at 1197.

[175]*See, e.g.*, IND. CODE §§ 35-50-2-4 to -7 (1982).

[176]*See* Morris, *supra* note 170, at 1197. Again, the likelihood of this occurring would probably be greater in proceedings against well established corporations.

[177]The bifucated trial was recommended in Note, *Double Jeopardy, supra* note 38, at 1020-21 to overcome the pitfalls endemic to punitive damages determinations.

[178]*See* Morris, *supra* note 170, at 1178-79.

[179]Ellis, *supra* note 22, at 31.

such acceptance would temper the new statute's potential misuse by striking an equitable balance among the defendant's interest in protection against excessive punishment, the victim's interest in seeking private retribution, and the public's desire to check undesirable behavior. The shortcomings, however, may outweigh any benefits generated by the doctrine. For example, the task of balancing criminal and civil penalties to effect an "adequate" punishment is a highly subjective process. One court's determination of an equitable balancing may in fact be detrimental to the public good. The crime involved may be of such an egregious nature that public interests would best be served by a mandatory jail sentence, despite any previously imposed punitive awards. Furthermore, although separate determinations of liability and damages are designed to produce a fair punishment, they may actually encumber the administration of justice by causing unnecessary delays.

Other practical obstacles exist. As previously mentioned, judges and juries are simply not equipped with the appropriate standards by which to weigh and adjust different forms of punishment to each defendant. Also, the propriety of a jury second-guessing the decision of a criminal court judge might be questionable where the civil trial follows the criminal proceeding. Moreover, the extent of penalties inflicted should not rest on the unpredictable timing of the two trials.

Review of a penalty, either criminal or civil, might also pose problems. Although a balancing of different forms of punishment may originally have been struck at the trial court level to the satisfaction of some parties, an appeal and subsequent reversal of one or both judgments would render such initial efforts at balancing mere exercises in futility. Additionally, a court or jury might hesitate to adjust a second penalty where the first had been appealed.

Ironically, the supplemental approach also fails to satisfy fully the double jeopardy principle *Taber* championed for so long. The defendant remains subject to multiple trials and hence is twice placed in fear of punishment.[180] But because supplementation supposedly individualizes punishment, thereby making it more effective and less uncompromising, the legal community may choose to tolerate having the defendant undergo two proceedings.

Ostensibly, the greatest advantage of the mitigation approach is evident when the illegal act complained of completely evades prosecution.[181] Applied to the facts of *Glissman v. Rutt*,[182] set out in the introduction of this Note, the defendant's prior conviction of reckless driving would not operate as a bar to plaintiff's request for punitive damages for personal injuries sustained, but instead would be considered

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[180]The concern is not so much whether the defendant will suffer two trials, whereby he might be doubly punished, but whether the total punishment inflicted transcends the objectives of retribution and deterrence.

[181]*See* Note, *Double Jeopardy, supra* note 38, at 1021.

[182]175 Ind. App. 493, 372 N.E.2d 1188 (1978).

by the jury in determining civil relief designed to deter and punish the wrongdoer sufficiently.

D. The Defendant's Insolvency

A higher standard of proof and possible employment of the supplemental approach both serve to limit the plaintiff's recovery of punitive damages. The defendant's lack of resources, however, will probably represent the greatest deterrent to recovering a punitive claim.

Although the plaintiff may now recover punitive damages for conduct that is both tortious and criminal, statistical studies uniformly show that perpetrators of property offenses and crimes against the person are apt to be penniless.[183] The results from a sample study of ninety-three non-southern cities with populations of over fifty thousand clearly indicate a high correlation between lower income and the offenses of robbery, burglary, and crimes against the person.[184] Thus, of all defendants named in civil proceedings, the criminal is generally least able to satisfy a punitive damages judgment.

Nor will the unpaid civil claimant find adequate relief from state-run victim compensation programs. Indiana's own program, like its counterparts, does nothing more than its name implies — compensate victims of crime.[185] In 1979, the total budget for Indiana's victim compensation program was only $120,000 with the maximum award established at ten thousand dollars for a minimum loss of one hundred dollars.[186] Such a meager budget is hardly sufficient to compensate adequately the actual losses, including mental anguish, humiliation, and harm to reputation, suffered by thousands of claimants each year.[187] Excessive reliance upon state programs seems to indicate the high percentage of convicted criminals unable to pay compensatory damages,

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[183]Winning the civil suit is the easy step; the difficulty lies in enforcing the judgment. Kiesel, *Crime and Punishment*, 70 A.B.A. J. 25-28 (1984).

[184]The data was drawn from the 1970 U.S. Census of the Population and the 1971 Uniform Crime Reports. *See* Carroll & Jackson, *Inequality, Opportunity, and Crime Rates in Central Cities*, 21 CRIMINOLOGY 178 (1983). Similar statistical studies were conducted with reference to the homicide rate in two hundred four standard metropolitan areas. *See* Messner, *Poverty, Inequality, and the Urban Homicide Rate*, 20 CRIMINOLOGY 103, 112 (1982) ("Homicidal offenders are recruited disproportionately from the ranks of the poor, yet a large poverty population appears to be associated with a low homicide rate.").

[185]Indiana's victim compensation fund was established in 1978. The provisions governing its operation are codified at IND. CODE §§ 16-7-3.6-1 to -19 (1984).

[186]A comparison of other state budgets is provided in Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUDICATURE 485, 486 (1980).

[187]*See* Ashby, *New Crimes Laws Push Restitution, Increase Penalties*, L.A. DAILY J., Dec. 30, 1983, at 1, col. 6; Cox, *Underpayments Add to Woes of Fund to Aid Crime Victims*, L.A. DAILY J., Apr. 17, 1984, at 2, col. 4; L.A. DAILY J., Nov. 1, 1982, at 4, col. 1.

not to mention punitive awards. Therefore, the new punitive damages statute will probably not alleviate the financial misfortunes currently plaguing program operations.

Unhampered exercise of the newly-created opportunity to recover punitive damages is further compromised by the fact that many criminals escape apprehension. But "such a right is nonetheless limited only by the shortcomings of private initiative rather than by the shortcomings of the criminal justice system."[188]

VII. Conclusion

Until the legislature acted, the courts had unbendingly prohibited punitive damages where the defendant was subject to a criminal prosecution for the same act, primarily because of the constitutional prohibition against double jeopardy. In consideration of the often unprosecuted or underpunished criminal defendant and the inequities frequently generated by the application of *Taber* to various classes of litigation, the Indiana General Assembly has finally heeded the pleas of Indiana courts for a reevaluation of the rule against punitive damages.

The new statute exposes all offenders, whose acts are punishable as felonies or misdemeanors, to increased civil liability. In doing so, the deterrence and punishment purposes of punitive damages are more readily effected. While the legislature did not expressly limit the statute's scope of applicability, it did, however, pass a simultaneous measure upgrading the plaintiff's burden of proof from a preponderance of the evidence to clear and convincing proof, reserving the award for the most clear-cut cases of malicious or reckless conduct.

The *Taber* doctrine was founded on the principles of fairness underlying the constitutional prohibition against double jeopardy. A continuation and revitalization of this fairness rationale by Indiana courts in the form of mitigation of punishment might, at least in theory, guard against the pitfalls peculiar to the majority position, which ignores the possibility of punishment at both the criminal and civil levels. The supplemental approach would attempt to strike an equitable balance between the defendant's concern for overpunishment and the public's desire to check undesirable behavior. The adjustment of a punitive damages award to reflect a prior fine or prison sentence and the corresponding consideration of civil relief as a mitigating factor in determining punishment at the criminal level would apparently achieve both objectives.[189] The practical obstacles of the supplemental approach, how-

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[188]*See* McLemore, *supra* 43, at 83.

[189]The greatest advantage of the new punitive damages statute is, other than increasing monetary relief for civil claimants, the opportunity to make the punishment proportional to the crime:

> My object all sublime-
> I shall achieve in time-
> To let the punishment fit the crime.

W. Gilbert, The Mikado and Other Plays 42 (1917).

ever, particularly the possibility that judges and juries will not be truly capable of determining fair cumulative punishment, may persuade Indiana courts to reject its adoption. Furthermore, the requirement of clear and convincing proof, coupled with the permissible introduction of the defendant's financial status into evidence, should guard against overpunishment. For these reasons, it would appear that the Indiana judiciary will choose to avoid the pitfalls of the supplemental approach. Despite the potential for awards of punitive damages because of the new statute, the biggest obstacle to the effectiveness of the statute may be the insolvency or limited financial resources of the majority of the defendants who commit criminal acts.

ELIZABETH GINGERICH

In-house Corporate Counsel and Retained Attorneys: Should the Courts and Administrative Agencies Distinguish Them?

I. Introduction

An ever-growing trend finds corporations, both large and small, bringing the job of legal representation in house.[1] Several factors account for the growing number of corporate legal staffs. One of the primary reasons is the soaring cost of legal fees.

Litigation involving the business sector is ballooning at an enormous rate. Many companies find themselves paying hundreds of thousands of dollars annually in legal fees.[2] In an effort to reduce expenses, corporate legal advice has been brought under internal service departments, and the annual savings have been significant for many larger companies. Another impetus to internalize legal counsel is the beneficial specialization of attorneys both in the broad scope of the particular industry and, more specifically, in the individual company. Specialization is particularly attractive to corporations in high technology fields like electronics and computers, as well as to other highly specialized companies which deal in pharmaceuticals, biological research, aerospace, automobiles, and other unique products. Internal legal departments also enable the different groups of attorneys, such as patent and business lawyers, to commingle for a combined and improved sensitivity to the unique needs of the individual company.

The changing character of the legal community that was once dominated by the law firm has produced many previously unanswered questions. These issues range from the professional responsibility questions surrounding the "one-client" attorney to the practical aspects of a more competitive market. One of the most important questions to be resolved involves differential treatment by the courts of two classes of attorneys, namely in-house and retained counsel.

A recent case focused on an important question of first impression that courts and administrative agencies will likely face with increasing regularity in the future. This case, *United States Steel Corp. v. United States*,[3] highlights the current need to establish sound precedents to ease the metamorphosis of the legal community.

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[1]Allaux, *A New Corporate Powerhouse; The Legal Department*, Bus. Wk., April 9, 1984, at 66-71; Popper, *Xerox's Legal "Revolutionary" Tightens His Grip*, Bus. Wk., April 9, 1984, at 67; Allaux, *Can An In-House Lawyer Say "No" To His Boss?*, Bus. Wk., April 9, 1984, at 70.

[2]Legal Times, July 21, 1983, at 2, col. 1.

[3]730 F.2d 1465 (D.C. Cir. 1984).

In *U.S. Steel*,[4] the Court of International Trade (C.I.T.) established a polarized situation when it distinguished between "in-house" corporate counsel and "retained" attorneys. Discovery of confidential information under a protective order was sought by both classes of attorneys but was granted only to the outside lawyers. The C.I.T. acknowledged the need for discovery, but found in-house corporate attorneys more likely to disclose "inadvertently" secret information to their client because of their general status as employees.

Three principal solutions to this dilemma are available. This Note examines the distinctions *U.S. Steel* draws between in-house and retained counsel and addresses the three primary solutions to the dilemma. First, the courts could establish a per se rule denying corporate counsel access to sensitive information. Second, they could embark on a time-consuming case-by-case analysis each time the conflict arises. Lastly, the courts could reject any distinction among practicing attorneys and continue to treat all lawyers equally before the bench. An analysis of existing case law and statutes, along with a concern for judicial efficiency in light of increasing dockets, points toward the latter approach—maintaining equality in the treatment of all attorneys.

II. Status of the Law Prior to *U.S. Steel*

The Federal Rules of Civil Procedure govern civil cases in federal courts. Administrative agencies, however, apply their own rules which sometimes conflict with the rules of civil procedure. *U.S. Steel* is a prime example of what happens when two opposing rules are used at different stages of the proceeding. Careful reasoning will show that the particular administrative discovery rules applied in *U.S. Steel* are inapplicable and should capitulate to the Federal Rules of Civil Procedure on discovery.

A. Federal Rules of Civil Procedure

A party's right to discovery in civil proceedings has long been a basic tenet of the law, upheld by the Federal Rules of Civil Procedure.[5] Since the inception of the Federal Rules, discovery of information has been permitted to provide a party with a more thorough base of factual information upon which to base his case. Historically, interpretation of the rules has been rather liberal, allowing a party to prepare more effectively by drawing upon the information possessed by his adversary. In *Hickman v. Taylor*,[6] the Supreme Court stated, "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[7] Only in cases where one party could claim privilege or show

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[4]United States Steel Corp. v. United States, 569 F. Supp. 870 (Ct. Int'l. Trade 1983).

[5]Fed. R. Civ. P. 26(c).

[6]329 U.S. 495 (1947).

[7]*Id.* at 507.

potential harm to his client would discovery be refused. Even when damaging information was involved, a weighing of interests was performed by the courts to make sure that denial of discovery would not prevent the party seeking discovery from preparing an adequate claim or defense.[8]

One provision of rule 26 allows the court to "[m]ake any order which justice requires"[9] to protect a party from the harmful results of the dissemination of confidential information through discovery. The rule, however, requires that the party seeking the protective order show good cause for the ruling,[10] thus placing the burden on the moving party.[11] These protective orders were governed by rule 30(b) prior to

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[8]*See generally* Centurion Industries, Inc. v. Warren Steurer, 665 F.2d 323 (10th Cir. 1981); Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir. 1965); Julius M. Ames Co. v. Bostich, Inc., 235 F. Supp. 856 (S.D.N.Y. 1964). Johnson Foils, Inc. v. Huyck Corp., 61 F.R.D. 405 (D.C.N.Y. 1973).

[9]FED. R. CIV. P. 26(c). Rule 26(c) states:

TITLE V—DEPOSITIONS AND DISCOVERY

Rule 26. General Provisions Governing Discovery

* * *

(c) Protective Orders. Upon its own initiative, or upon motion by a party or by the person from whom discovery is sought, and *for good cause shown*, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden, delay or expense, including one or more of the following:

(1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may on such terms and conditions as are just, order that any party or person provide or permit discovery.

(emphasis added).

[10]United States v. Purdome, 30 F.R.D. 338, 341 (W.D. Mo. 1962). *See also* Velasquez v. South Atl. S.S. Line, Inc., 11 F.R.D. 196 (S.D.N.Y. 1951); Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477 (W.D.N.Y. 1943).

[11]F.C.C. v. Schrieber, 329 F.2d 517, 537 (9th Cir. 1964) (Browning, J. dissenting), *modified*, 381 U.S. 279 (1965); *see also* Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 257, 259 (D.C. Del. 1979) (In regard to the party moving for discovery, the court stated, "If a movant can demonstrate that an inspection of such information is relevant and necessary to prepare his case for trial, or that denial of inspection would prejudice the movant, result in hardship or work an injustice, disclosure with proper safeguards is appropriate."); Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 202 (S.D.N.Y. 1977) (citing Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972)); United States v. International Business Mach. Corp., 67 F.R.D. 40, 46 (S.D.N.Y. 1975) (The court held that parties before that court which move to deny discovery of confidential information must show a "*clearly defined and very serious injury* to [their] business.") (emphasis added); Hunter v. International Sys. and Controls Corp., 51 F.R.D. 251 (W.D. Mo. 1970); Essex Wire Corp. v. Eastern Sales Co., Inc., 48 F.R.D. 308 (E.D. Pa. 1969); Apco-Oil Corp. v. Certified Transp. Inc., 46 F.R.D. 428 (W.D. Mo. 1969).

1970. In addition to orders which justice requires, the existing rule encompassing protective orders lists eight types of protective orders that may be implemented. Part (5) of rule 26(c) provides the alternative "that discovery be conducted with no one present except persons designated by the court."[12] The corresponding portion of former rule 30(b) stated "that the examination shall be held with no one present except the parties to the action and their officers or counsel."[13] When interpreting former rule 30(b), the "or" in the statement above must be taken to mean "and." The court in *Dunlap v. Reading Company*[14] concluded that "'or,' of course, must here be read as 'and.'"[15] It would not make sense to allow the party to discover information and yet exclude his attorney who must argue the case. Thus, the statute was read as preventing the exclusion of the party's counsel.[16] Nothing indicates that the Advisory Committee intended to change the meaning of this section when this rule was incorporated under rule 26(c) in the 1970 Amendments and reorganization of the rules.[17] Nor was there any attempt by the legislature to distinguish between "in-house" and "retained" counsel. The primary reason for recodifying this provision in rule 26(c) was to allow rule 26 to apply to discovery in general rather than to depositions only.

Part (7) of rule 26(c) states that "a trade secret or other confidential research, development, or commercial information [shall] not be disclosed

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[12]FED. R. CIV. P. 26(c)(5).

[13]FED. R. CIV. P. 30(b) (1969 (superseded)).

Rule 30. Depositions Upon Oral Examination

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(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

[14]Dunlap v. Reading Co., 30 F.R.D. 129 (E.D. Pa. 1962).

[15]*Id.* at 131 n.6. *See also* United States v. Fisk, 70 U.S. 445, 447 (1866). The court stated, "In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.' " *See also* Peacock v. Lubbock Compress Co., 252 F.2d 892 (5th Cir. 1958); Perfect Photo, Inc. v. Grabb, 205 F. Supp. 569, 571 (E.D. Pa. 1962); Pennsylvania Labor Relations Bd. v. Martha Co., 359 Pa. 347, 59 A.2d 166 (1948); Burgis v. County of Philadelphia, 169 Pa. Super. 23, 25, 82 A.2d 561, 563 (1952).

[16]8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2041 (1970) (hereinafter cited as WRIGHT & MILLER). *See also* Queen City Brewing Co. v. Duncan, 42 F.R.D. 32 (D.C. Md. 1966).

[17]8 WRIGHT & MILLER, *supra* note 16, at § 2041.

or be disclosed only in a designated way." Although this might apply when confidential information is desired for discovery, it cannot supersede the intent of part (5), which mandates the presence of the party's attorney if any discovery is to be had.

In *Textured Yarn Co. v. Burkart-Schier Chemical Co.*,[18] the court, following former rule 30(b), granted a protective order allowing the parties and their attorneys access to the information in question.[19] Guided by current rule 26(c)(5), the court in *United States v. International Business Machines Corp.*[20] allowed discovery of confidential documents to the "attorneys" for I.B.M. without distinguishing between "in-house" and "retained" attorneys. With a corporate legal staff of approximately 146 lawyers,[21] it is a fair assumption that some members of the corporate staff were involved with this case. I.B.M.'s motion to restrict discovery by Xerox Corporation to their "outside counsel" only was denied in *Xerox Corp. v. International Business Machines Corp.*[22] Consequently, Xerox's in-house attorneys were permitted to discover documents held by I.B.M. for purposes of this case. It can be seen then, that historically, attorneys have been included in the discovery process.

B. Customs Duties—Administrative Rules

In sharp contrast to the long established interpretation of the rules of civil procedure are the administrative rules found under Customs Duties, 19 U.S.C. section 1516a.[23] The language of the customs statute

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[18]41 F.R.D. 158 (D.C. Tenn. 1966).

[19]*Id. See also* Turmenne v. White Consol. Indus., Inc., 266 F. Supp. 35 (D.C. Mass. 1967) (only defendant's counsel, active in the case, and those appointed by him, entitled to discovery of plaintiff's information); United States v. Lever Bros. Co., 193 F. Supp. 254 (S.D.N.Y. 1961), *cert. denied*, 371 U.S. 932 (1962) (information held by third party given to attorneys for Lever Brothers through discovery); American Oil Co. v. Pennsylvania Petroleum Prod. Co., 23 F.R.D. 680 (D.R.I. 1959) (court allowed discovery by plaintiff's attorney but not their employees). These cases are typical of pre-1970 cases governed by superseded FED. R. CIV. P. 30(b).

[20]461 F. Supp. 732 (S.D.N.Y. 1978).

[21]LAW AND BUSINESS DIRECTORY OF CORPORATE COUNSEL 621 (M. Flores ed. 1983).

[22]75 F.R.D. 668, 672 (S.D.N.Y. 1977). *See also* Centurion Indus., Inc. v. Warren Steurer and Assoc., 665 F.2d 323 (10th Cir. 1981), where only the attorneys involved in the litigation were allowed discovery of certain information.

[23]19 U.S.C. § 1516a(b)(2)(B) (1982), which provides:

> §1516a. Judicial review in countervailing duty and antidumping duty proceedings.
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> ***
>
> b. Standards of review.-
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> ***
>
> (2) Record for review.-
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>
> (B) Confidential or privileged material. — The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

is very broad, leaving a great deal of discretion to the court. This statute is used in international trade cases involving countervailing duty or anti-dumping duty proceedings. The "discovery" of confidential documents in administrative hearings by the International Trade Commission is governed by this statute. The Court of International Trade (C.I.T.)[24] also relies on 19 U.S.C. section 1516a(b)(2)(B) for guidance in rulings on discovery of confidential data. International trade litigation involves much more discovery of confidential data than do most areas of the law. Divulgence of trade secrets, customer lists, and financial data to a competitor can have a great impact on a company. Therefore, protective orders based on these statutes are commonplace.

A court's discretionary powers, inherent in 19 U.S.C. section 1516a(b)(2)(B), were taken to a new zenith in 1980 when the C.I.T., in *Atlantic Sugar Ltd. v. United States*,[25] held that "[i]n no event shall disclosure of confidential information be made to in-house counsel or other representatives, or employees of plaintiffs or the interested parties."[26] The court, however, allowed the plaintiff 's outside lawyers access to the confidential information. Nothing in the language of Public Law 96-39 (Trade Agreements Act of 1979)[27] nor in the legislative history of that act[28] indicates that the legislature intended to distinguish between in-house attorneys and any other class of lawyers. Indeed, Congress' silence on the matter indicates that it never anticipated a distinction between classes of attorneys. Nevertheless, in 1983 the C.I.T. and the same presiding justice again distinguished between in-house and retained counsel in *United States Steel v. United States*.[29]

C. Title 19 C.F.R. Section 207.7—Direct Conflict With F.R.C.P. 26(c)

With this express distinction between in-house and other attorneys, the stage was set for far-reaching, discretionary decisions in discovery of confidential information. The most significant erosion of historically liberal discovery, however, came in 1979 when the Code of Federal Regulations explicitly denied access of confidential information to corporate counsel under the administrative regulations for the United States International Trade Commission.[30] The trade regulation states, "[T]he Secretary may make such confidential information available to an attorney

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[24]The Court of International Trade is a federal court with all the power of a United States district court. It has jurisdiction over trade-related cases. Appeals from the C.I.T. go to the United States Court of Appeals for the Federal Circuit, and then to the United States Supreme Court.

[25]85 Cust. Ct. 114 (1980).

[26]*Id.* at 116.

[27]Trade Agreements Act of 1979, Pub. L. 96-39, § 1582, 93 Stat. 144 (1979).

[28]1979 U.S. CODE CONG. & AD. NEWS 381.

[29]730 F.2d 1465 (D.C. Cir. 1984).

[30]Customs Duties, 19 C.F.R. § 207.7(a) & (b) (1983).

of such an interested party, *excepting corporate counsel*, under a protective order. . . ."[31] In yet another part of the same section, the regulations state that an attorney will: "(1) Not divulge any of the information . . . to any person other than . . . (iii) An attorney, *excepting in-house counsel*. . . ."[32]

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[31]Customs Duties, 19 C.F.R. § 207.7(a) (1983), which provides:

§ 207.7 Limited disclosure of certain confidential information under a protective order.

(a) upon request of an attorney for an interested party to the investigation, excepting corporate counsel which (1) describes with particularity the information requested, (2) sets forth the reasons for the request, (3) demonstrates a substantial need for the information in the preparation of his case, and (4) demonstrates that he is unable without undue hardship to obtain the substantial equivalent of the information by other means, the Secretary will make available confidential information concerning the domestic price and cost of production of the like product submitted by the petitioner or by an interested party in support of the petitioner to such attorney under a protective order described in paragraph (b) of this section. Upon filing with the Secretary of an agreement among all interested parties who are parties to the order of confidential information submitted by such interested parties, other than domestic price cost of production data, the Secretary may make such confidential information available to an attorney of such an interested party, *excepting corporate counsel*, under a protective order described in paragraph (b) of this section. The Secretary may adopt, from time to time, forms for submitting requests for disclosure pursuant to a protective order incorporating the terms of this rule. The Secretary shall determine whether the requirements for release of information under this rule have been satisfied. The Secretary's determination shall be final for purposes of review by the Customs Court under section 777(c)(2) of the Act.

(emphasis added).

[32]Customs Duties, 19 C.F.R. § 207.7(b) (1983), which provides:

* * *

(b) Protective Order. The protective order under which information is made available to the attorney of an interested party shall require him to submit to the Secretary in a form prescribed by the Secretary a personal sworn statement that, in addition to such other conditions as the Secretary may require, he will:

(1) Not divulge any of the information so obtained and not otherwise available to him, to any person other than,

(i) Personnel of the Commission concerned with the proceeding,

(ii) The person or agency from whom the information was obtained,

(iii) An attorney, *excepting in-house counsel* employed on behalf of the party requesting the disclosure, and who has furnished a similar statement, or,

(iv) Those persons independently contracted with, or employed or supervised by, the attorney having a need thereof in connection with the proceeding and who have furnished a similar statement;

(2) Use such information solely for the purposes of the Commission proceeding then in progress or for judicial or Commission review thereof;

(3) Not consult with any person not described in paragraph (b)(1)(iii) or (iv) concerning such confidential information without first having received the written consent of the Secretary and the attorney of the party from whom such confidential information was obtained;

(4) Not copy or otherwise reproduce any confidential material obtained under protective order except in accordance with procedures to be established by the Secretary; and,

(5) Report promptly to the Secretary any breach of the protective order.

(emphasis added).

These trade regulations guide the conduct of the United States International Trade Commission and, although administrative in nature, are in direct conflict with the Federal Rules of Civil Procedure. The effect of this regulation can be seen in the C.I.T.'s ruling in *Atlantic Sugar*[33] discussed above.[34] The direct conflict between the federal rules and the administrative rules is embodied in *U.S. Steel* and is examined in more detail below.

III. *U.S. Steel Corp. v. United States*

A. Facts

The dilemma in the important *U.S. Steel*[35] decision comes into focus when reviewing the statutory evolution involved. When *U.S. Steel* reached the United States Court of Appeals, the Federal Rules of Civil Procedure finally clashed with the statutory regulations used in administrative hearings by the International Trade Commission and in cases heard by the C.I.T. Analysis of the factual backgroud and procedural history of the case is beneficial to an understanding of the issues.

U.S. Steel first filed its case with five co-plaintiffs,[36] domestic steel producers, against foreign competitors for trade violations. The defendants were steel companies from Brazil, Korea, and Spain. The plaintiffs sought discovery of confidential business information from the administrative records of the International Trade Commission. The European Community settled with the plaintiffs, and the discovery issue arose again in the suit with the remaining defendants.[37] After an *in camera* examination of the information sought by the plaintiffs, the court determined that the documents contained important financial, production, and sales data. On a motion by the defendants and the Commission, the court granted a protective order. Access to some of the documents was denied to all parties because of privilege considerations. Nevertheless, some of the information termed by the court as "ineradicabl[y] important"[38] and "extremely potent"[39] was opened for discovery under the protective order to all involved counsel except the in-house attorneys who had represented U.S. Steel from the outset. In other words, once the court determined that some information was important enough to merit discovery despite its confidential nature, discovery was granted only to those plaintiffs

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[33]*Atlantic Sugar, Ltd.*, 85 Cust. Ct. at 114, 133.

[34]*See supra* text accompanying note 25.

[35]730 F.2d 1465.

[36]Co-plaintiffs in the suit were Republic Steel Corporation, Inland Steel Corporation, and Cyclops Corporation.

[37]U.S. Steel Corp. v. United States, 569 F. Supp. 870 (Ct. Int'l. Trade 1983).

[38]*Id.* at 871.

[39]*Id.*

represented by "retained" lawyers, which included all parties except U.S. Steel.[40]

The only non-C.I.T. case cited by the C.I.T. in *U.S. Steel* was *F.T.C. v. Exxon Corp.*[41] This case can be distinguished from *U.S. Steel* because it was an antitrust case and involved a parent and subsidiary corporation. In an effort to keep the companies separate, at least until adjudication of the case, the district court prohibited both in-house and retained counsel for Exxon from maintaining an attorney/client relationship with its subsidiary. Of the four cases cited in the *Exxon* decision, one was an unpublished district court opinion and none of the other three cases definitively restricted in-house counsels' right to discovery.[42]

U.S. Steel then asked the C.I.T. for certification of the question for immediate appeal.[43] Upon certification of the question for interlocutory review, the case was heard by the United States Court of Appeals for the Federal Circuit.[44]

One procedural issue in *U.S. Steel* is of particular importance to future cases in which a court distinguishes between corporate in-house attorneys and retained law firms. The question involves the time at which a litigant may appeal a lower court decision preventing discovery by his in-house counsel or in any other way prohibiting the in-house staff from effectively representing the client. In a recent analogous case, the Seventh Circuit Court of Appeals examined this question.

In *Freeman v. Chicago Musical Instrument Co.*,[45] the defendant's co-counsel was disqualified because a member of his law firm had previously worked for the firm that represented the plaintiff.[46] The defendant appealed the district court's decision. Before the court of appeals addressed the case on its merits, it first had to determine whether a court order disqualifying counsel could be appealed prior to a final judgment.[47]

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[40]*Id.* at 873.

[41]636 F.2d 1336 (D.C. Cir. 1980).

[42]*Id.* at 1350 (citing SCM v. Xerox Corp., Civil No. 15,807 (D. Conn. May 25, 1977) (Pre-Trial Ruling No. 44) (A. 996-1000), *aff'd sub nom. In re* Xerox Corp., 573 F.2d 1300 (2d Cir. 1977); *In re* Westinghouse Electric Corp. Uranium Contracts Litigation, 76 F.R.D. 47, 57 n.6 (W.D. Pa. 1977); Chesa Int'l., Ltd. v. Fashion Assoc., Inc., 425 F. Supp. 234 (S.D.N.Y.), *aff'd mem.*, 573 F.2d 1288 (2d Cir. 1977); FTC v. United States Pipe and Foundry Co., 304 F. Supp. 1254 (D.D.C. 1969).

[43]Republic Steel Corp. v. United States, 572 F. Supp. 275, 277 (Ct. Int'l. Trade 1983).

[44]U.S. Steel Corp. v. United States, 730 F.2d 1465.

[45]689 F.2d 715 (7th Cir. 1982).

[46]The firm of Fitch, Evan, Tabin, Flannery & Welsh (hereinafter referred to as Fitch) was hired by C.M.I. to work as co-counsel with Hill, Van Santen, Chiara and Simpson. (hereinafter referred to as Hill). An associate at Fitch had worked for the attorneys representing Freeman when earlier litigation between Freeman and C.M.I. was carried out. Consequently, upon a motion by Freeman's attorneys, Fitch was disqualified.

[47]689 F.2d at 717.

Although the factual circumstances differ between *Freeman* and *U.S. Steel*, there are similarities in the consequences of the courts' actions. By a disqualification of counsel, the client is estranged from the representation of his choice. Likewise, when in-house counsel are denied discovery, adequate representation of the client is precluded. In both situations, the court is essentially informing the litigants that other attorneys may fully protect their clients' rights, but that their present counsel will not be permitted to do so.

Because the United States Court of Appeals has jurisdiction over "all final decisions of the district courts of the United States,"[48] it must be determined what constitutes a final decision. Usually, this language has been interpreted as a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[49] The Supreme Court, however, in *Cohen v. Beneficial Industrial Loan Corp.*,[50] acknowledged that certain collateral orders that do not terminate the litigation on the merits are still considered appealable "final decisions" under section 1291.[51]

In 1981, the Supreme Court held that the *denial* of a motion to disqualify a party's attorney was not appealable under the *Cohen* test.[52] The Seventh Circuit Court of Appeals had not previously distinguished between orders granting and orders denying a motion to disqualify the opposing party's counsel, but had held that both were appealable decisions.[53] In *Freeman*, however, the Seventh Circuit did differentiate between them and held that orders *granting* disqualification motions are immediately appealable.[54]

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[48]28 U.S.C. § 1291 (1982).

[49]Catlin v. United States, 324 U.S. 229, 223 (1945), *quoted at* 689 F.2d at 717. This interpretation of the code was also cited with approval in Randle v. Victor Welding Supply Co., 664 F.2d 1064, 1065 (7th Cir. 1981).

[50]In Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), the Court enunciated a three-part test for an order to fall within the exception to the "final judgment" rule:

(1) The order must conclusively determine the disputed question; (2) It must resolve an important issue completely separate from the merits of the action; (3) The order must be effectively unreviewable on appeal from a final judgment.

[51]28 U.S.C. § 1291 (1982).

[52]Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981).

[53]Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 709 (7th Cir. 1976) (citing Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800, 805 (2d Cir. 1974)).

[54]689 F.2d at 718. The court noted the consistency of this holding with other circuits that had considered the same question since *Firestone*. *See, e.g.*, Grietzer & Locks v. Johns-Manville Corp., No. 81-1379 (4th Cir. 1982); United States v. Hobson, 672 F.2d 825, 826 (11th Cir. 1982); Ah Ju Steel Co., Ltd. v. Armco, Inc., 680 F.2d 751, 753 (C.C.P.A. 1982); United States v. Caggiano, 660 F.2d 184, 189 (6th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *In re* Coordinated Pretrial Proceedings, 658 F.2d 1355, 1356-57 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 748 n.2 (2d Cir. 1981); Duncan v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020, 1024-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981).

Consequently, any court action that deprives in-house counsel of necessary discovery or hampers their efforts to represent clients strictly because of their status as "in-house" essentially disqualifies the attorney for that portion of the proceeding. Therefore, such actions satisfy the *Cohen* requirements[55] and should therefore be immediately appealable findings.[56] Although the C.I.T. in *U.S. Steel*[57] certified the question for interlocutory appeal, the appealable nature of such an order will nevertheless be of importance in future cases which differentiate between retained counsel and corporate lawyers.

B. Issues and Holding

The sole issue in *U.S. Steel* was whether the C.I.T. erred when it distinguished between in-house and retained counsel and denied discovery of confidential material to in-house counsel strictly on the basis of their employment.[58] The court of appeals was quick to point out that the authority of the C.I.T. to control access to confidential materials was not in dispute.[59] In overturning the decision by the C.I.T., however, the court of appeals held that while the lower court could have prevented all parties and counsel from gaining access to the confidential documents, once it decided that discovery was proper, "it was error to deny access solely because of inhouse counsel's 'general position.' "[60] The appellate court went on to hold that "status as in-house counsel cannot alone create that probability of serious risk to confidentiality"[61] and thus cannot be the only reason for denying access to confidential information. In conclusion, the court of appeals promulgated a new test which based discovery of confidential material on the relationship between the individual attorneys and their clients, regardless of the attorney's status as retained or in-house.[62]

C. Questions Left Unanswered by U.S. Steel

The appellate court did not specifically address several questions facing it because it was able to adjudicate the case without treatment

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[55]*See supra* note 50.

[56]*See supra* note 50 and accompanying text. Denial of discovery to in-house attorneys because of their position as corporate lawyers (1) conclusively determines the disputed question, (2) resolves an issue separate from the merits of the case, and (3) is effectively unreviewable after a final judgment of the case because of the "[i]mmediate, severe, and often irreparable . . . consequences upon both the individual [client] . . . as well as . . . the disqualified counsel." 689 F.2d at 719.

[57]Republic Steel Corp. v. United States, 572 F. Supp. 275, 277 (Ct. Int'l. Trade 1983).

[58]*U.S. Steel Corp.*, 730 F.2d at 1467. *See* the text accompanying *supra* notes 41-42 and *infra* notes 68-134 for a more detailed discussion of the sub-issues involved in the determination of this case.

[59]*U.S. Steel Corp.*, 730 F.2d at 1467 (citing 19 U.S.C. § 1516(a)(b)(2)(B) (1982)).

[60]730 F.2d at 1467.

[61]*Id.* at 1469.

[62]*Id.*

of these questions. Three of the questions, however, could bear significantly on future cases and, because of the possible impact of *U.S. Steel*, should have been examined by the court when it had the opportunity.

The first question was whether the C.I.T. had created a per se rule requiring denial to all in-house attorneys of confidential discovery in all future cases.[63] Because the factual aspects of future cases will differ from those in *U.S. Steel*, it would be helpful to examine whether the arbitrary per se ban would withstand judicial scrutiny.[64] The second question raised constitutional issues relating to U.S. Steel's right to its choice of counsel and the disenfranchisement of counsel without due process.[65]

The third question was whether Rule 26 of the Federal Rules of Civil Procedure or 19 U.S.C. section 1516a(b)(2)(B) should have governed in this trade case.[66] As enunicated by the dissent in the court of appeals, the failure to rule on this question creates an anomaly if the court and the International Trade Commission enforce inconsistent rules regarding the same documents.[67] The failure to decide this third question may cause the issue to remain in dispute or may result in conflicting orders between administrative agencies and the courts until Congress corrects 19 U.S.C. section 1516a(b)(2)(B) to make it consistent with both historical precedent and the current rules of civil procedure. The failure to act upon these questions may have a deleterious effect on future cases by creating further uncertainties about the broad scope of the main issue at hand. The results of such uncertainties as well as the decision by the C.I.T. in *U.S. Steel* are investigated below.

IV. Ramifications of *U.S. Steel*

The *U.S. Steel* decision will have far-reaching ramifications because the development of in-house counsel is changing the traditional ways in which the legal community has operated. *U.S. Steel* offers a prime example of the types of questions with which courts will have to grapple. The court's approach to these novel issues will be crucial to the formation of tomorrow's legal environment. The import of the *U.S. Steel* decision must, therefore, be closely analyzed.

The *U.S. Steel* decision has an impact on the propriety of establishing arbitrary per se rules, the constitutional right to choose effective counsel, the due process implications of divesting a litigant of his representation by counsel, and the professional responsibility of both corporate and outside lawyers. The following sections address each area separately.

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[63] *Id.*

[64] *See infra* text accompanying notes 68-92.

[65] 730 F.2d at 1469; *see also* text accompanying *infra* notes 93-114.

[66] 730 F.2d at 1469.

[67] 730 F.2d at 1469 (Nichols, J., dissenting).

A. Justice Department Opposition to the Per Se Rule

Traditionally, discovery has been granted on the basis of need. Judge Watson issued an opinion that found need on the part of U.S. Steel but still denied it access to the record.[68] Although the court noted that 19 U.S.C. section 1516a(b)(2)(B) requires a balancing of the need for access to information against the need for maintaining confidentiality, the court stated that discovery by in-house counsel complicated the test. The C.I.T., without balancing any factual information, proceeded to analogize *U.S. Steel*[69] to its earlier decisioin in *Atlantic Sugar*,[70] which denied corporate counsel the right to discovery because of their status as in-house counsel. Yet in a case decided the week before *Atlantic Sugar*, the C.I.T. stated that while discovery might cause incalculable harm to a competitor, the court also recognized "the necessity of allowing a party to fully prepare and present its legally authorized challenge to an administrative determination and to do so based on all available relevant material."[71] Further, the court stated that it considered lawyers to be independent officers of the court, and not alter egos of the plaintiff.[72] In another more recent case, the C.I.T. stated that it could not envision how the plaintiffs could effectively challenge the findings of the government without the needed discovery.[73] The inconsistency in the C.I.T. rulings weakens its argument for distinction among attorneys.

The court's distinction in *U.S. Steel* between in-house corporate counsel and retained counsel was based solely on the court's perceptions and not on a factual basis. The court found that the volume of information placed it "beyond the capacity of anyone to retain in a consciously separate category."[74] This was the same information, however, that the court released to the retained counsel of U.S. Steel's co-plaintiffs. The C.I.T. then stated, "Obviously, this judgment can also apply to retained counsel. . . . It is impossible, however, to extend this reasoning to its logical conclusion. . . ."[75] Indeed, this is so because the logical conclusion to the court's reasoning results in finding no difference between the likelihood of disclosure by in-house versus retained counsel. This fact substantiates the per se characterization of the rule adopted by the C.I.T.

The court attempted further to support the distinction by stating that in-house counsel "[have] a closer and more sustained relationship . . . as an outgrowth of the employer-employee relationship."[76] The

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[68]*U.S. Steel Corp.*, 572 F. Supp. 275 (Ct. Int'l. Trade 1983).

[69]*Id.*

[70]85 Cust. Ct. at 133.

[71]Connors Steel Co. v. United States, 85 Cust. Ct. 112, C.R.D. 80-9 (1980).

[72]*Id.*

[73]American Spring Wire Corp. v. United States, No. 83-54, slip op. (Ct. Int'l Trade June 10, 1983).

[74]*U.S. Steel Corp.*, 569 F. Supp. at 872.

[75]*Id.*

[76]*Id.*

C.I.T. also stated that the court's concerns were with the "counsel's general position in the corporate environment. . . ."[77] The court also assumed that in-house counsel will move into other roles within their company, making it even more difficult to keep discovered information confidential.[78] Therefore, the lower court saw greater chances of "inadvertent disclosure" by lawyers employed by a single company.[79] It is interesting to note, however, with regard to the court's concern for the changing roles assumed by in-house counsel, that the same fungibility of retained attorneys is illustrated by the fact that Bethlehem Steel Corporation's legal department employs at least three former associates of Cravath, Swaine, and Moore.[80] This is the same firm that represented the other plaintiffs in *U.S. Steel*[81] and gained access to the information denied the in-house staff of U.S. Steel. The per se nature of the C.I.T.'s ruling is further demonstrated by the court's failure to outline any measures that in-house counsel could take to gain access in the future.

The per se categorization of the rule enunciated by the court in *U.S. Steel*[82] is clear. In a brief submitted on behalf of U.S. Steel by the Justice Department, the Assistant Attorney General stated, "It is our position that any rule which distinguishes between attorneys solely on the basis of whether they are salaried or retained is incorrect as a matter of law."[83] Earlier, the Justice Department issued a statement in regard to the International Trade Commission's promulgation of section 207.7[84] saying, "We believe this rule is inappropriate because it arbitrarily distinguishes between attorneys solely on the basis of whether they are salaried or retained."[85] The Antitrust Division of the Department of Justice also voiced its disagreement with section 207.7 because of "the anticompetitive and potentially inflationary impact of [C.F.R. section 207.7 which] discriminates against in-house counsel,"[86] noting that "competition in the market for legal services is diminished."[87] Thus, the Justice Department has clearly denounced any per se rule.

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[77]*Id.*

[78]*Id.*

[79]*Id.*

[80]LAW AND BUSINESS DIRECTORY OF CORPORATE COUNSEL 163-64 (M. Flores 1982).

[81]730 F.2d 1465.

[82]569 F. Supp. 870.

[83]Appendix for Appellant at 185, U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984).

[84]*See supra* notes 30-34 and accompanying text.

[85]Brief for Appellant at 10, U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984).

[86]Comments of Department of Justice addressed to The International Trade Commission, p.1 (July 17, 1981). The letter stated in part:

> We note particularly the anticompetitive and potentially inflationary impact of a rule that discriminates against in-house counsel. Many businesses, in an effort to reduce the costs of the legal services they need, choose to rely in whole or part for those services on a salaried legal staff. The availability of that choice provides incentives for outside firms to make their services more attractive in terms of cost, quality, efficiency, and other competitive factors. To the extent that inhouse counsel are arbitrarily handicapped in their ability to perform comparable services, competition in the market for legal services is diminished.

[87]*Id.* at p.2.

The Supreme Court, in consideration of the validity of per se exclusionary rules, has condemned all per se rules with economic consequences that were not clearly supported by undisputed facts and the experience of the ruling court. A judicially created rule must be supported by sufficient investigation of the facts so that there will not be room for a difference of opinion. These strict guidelines are needed because a per se rule makes no allowances for rebuttal or evidence regarding extenuating circumstances.[88] The Court in *United States v. Topco*[89] stated that per se rules cannot be based simply on the courts' perceptions.[90]

From the record,[91] it appears the C.I.T. elicited no testimony from in-house attorneys, corporate executives, or behavioral scientists to verify the court's presumption[92] that staff attorneys are subject to different pressures or are more likely to divulge inadvertently confidential data than are their outside lawyer counterparts. Thus, any per se rule established by the C.I.T. in *U.S. Steel* should not be allowed to stand under the standards established by the Supreme Court. Although the apellate court found it unnecessary to review this issue, the significant impact of any per se ruling demands close scrutiny.

B. A Corporation Has a Right to Choose Its Own Lawyer

The right of a corporation or any client to be represented by counsel of its choice has always been a part of the American legal system. Although many of the major cases articulating this precept are criminal, they can all be compared to civil actions in general, and *U.S. Steel* in particular, given the Supreme Court's interpretation of the constitutional right.

In a Supreme Court case, a criminal conviction was overturned because the defendant did not have opportunity to choose counsel and the court failed to appoint an attorney in a timely fashion.[93] The Court stated that any hearing "[h]istorically and in practice . . . has always included the right to the aid of counsel when desired and provided by the party asserting the right."[94] The Court further stated, "If in any case, *civil* or criminal, a state or federal court . . . refuse[s] to hear a party by counsel . . . such a refusal would be a denial . . . of due

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[88]Catalano v. Target Sales, Inc., 446 U.S. 643 (1980).

[89]405 U.S. 596 (1972).

[90]*Id.* at 607. The Court stated that in regard to trade violations of the Sherman Act, any classification as a per se violation must come "[o]nly after considerable experience with certain business relationship. . . ." *Id.*

[91]Brief for Appellant at 25, *U.S. Steel Corp.*, 730 F.2d 1465.

[92]*See* Klinkhammer v. Richardson, 359 F. Supp. 67 (D. Minn. 1973). The district court held that lack of empirical evidence for a per se rule may, under a rational basis test, render it unconstitutional. *Id.*

[93]Powell v. State of Alabama, 287 U.S. 45 (1932); *see also* Smith v. United States, 288 F. 259, 260 (D.C. Cir. 1923).

[94]287 U.S. at 68-67.

process in the constitutional sense."[95] The court in *United States v. Bergamo*[96] stated that while the sixth amendment provides that a criminal defendant has a right to counsel, the Supreme Court has furthered that principle by interpreting it as a right to the counsel of defendant's choice.[97] In *Backer v. Commissioner of Internal Revenue*,[98] a case addressing the rights of parties called before administrative bodies, the appellate court held that the guaranteed rights to counsel under the Administrative Procedure Act[99] are even broader than constitutional rights to an attorney.[100] The *Backer* court upheld the plaintiff's statutory rights, and noted that the right to counsel has "always been construed to mean counsel of one's choice."[101] Consequently, hearings by the International Trade Commission would fall within the ambit of the statute.

The C.I.T., in deciding *U.S Steel*,[102] concluded that requiring U.S. Steel to retain outside counsel to represent its interests in the discovery of critical information remained a viable and reasonable solution.[103] This decision effectively denied the litigant its choice of effective, knowledgeable, and economic counsel. The C.I.T. further stated that the court had "difficulty conceiving of the right of a particular lawyer to participate in a case, or the right of a person to choose a particular lawyer. . . ."[104] The holdings in *Bergamo*[105] and *Powell*[106] are in contrast to the *U.S. Steel* decision. "There is no question but that the right to the assistance of counsel . . . means *effective* assistance."[107] U.S. Steel had been represented solely by its in-house counsel throughout the entire litigation of its case, which had spanned a number of years. At the time when U.S. Steel was denied discovery, it would have been very difficult to acquaint outside counsel adequately with the case in order to ensure effective representation of U.S. Steel. The appellate court described the case as "extremely complex and at an advanced stage,"[108] and found the C.I.T.'s decision an "extreme and unnecessary hardship"[109] on U.S. Steel. The *Bergamo* court's holding that "[a]ssistance is not effective

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[95] *Id.* at 69 (emphasis added).

[96] 154 F.2d 31 (3rd Cir. 1946).

[97] *Id.* at 34. (citing Glasser v. United States, 315 U.S. 60, 70 (1942)); Powell v. State of Alabama, 287 U.S. 45 (1932).

[98] 275 F.2d 141 (5th Cir. 1960).

[99] 5 U.S.C. §§ 1001-1005 (1982).

[100] *Backer*, 275 F.2d at 143; U.S. CONST. amend. V.

[101] 275 F.2d at 144. *See, e.g., Powell*, 287 U.S. 45; *Chandler*, 348 U.S. 3; Smith v. United States, 288 F. 259 (D.D.C. 1923); *Bergamo*, 154 F.2d 31.

[102] 569 F. Supp. 870.

[103] *Id.* at 871.

[104] *Id.* at 873.

[105] *Bergamo*, 154 F.2d 31.

[106] *Powell*, 287 U.S. 45.

[107] 154 F.2d at 34. (citing *Powell*, 287 U.S. at 68-71) (emphasis added).

[108] 730 F.2d at 1468.

[109] *Id.*

when counsel has insufficient time to prepare his [case]"[110] buttresses this conclusion. In *United States v. Lever Bros. Co.*,[111] the court specifically granted discovery of confidential competitive information to in-house counsel for Lever Brothers. The district court found the decision necessary because the nature of the material required review by expert personnel "intimately familiar" with the industry.[112] The Ninth Circuit Court of Appeals stated that "familiarity with a complicated corporate background would appear to be a prerequisite for effective representation."[113] In a more recent decision, the Seventh Circuit Court of Appeals overturned a disqualification motion granted by a lower court and stated that it would be difficult, if not impossible, for a new attorney to master the "nuances" of the litigation in the latter stages of a complex case.[114] The same result would occur when in-house counsel are summarily denied access to necessary information, thus requiring a party to retain new counsel.

The courts have established that a party's right to counsel is not limited to the elementary constitutional right to choose one's own attorneys, but also includes the right to effective representation. Therefore, any arbitrary denial to in-house counsel of the opportunity to uphold effectively and efficiently the interests of their corporate clients in matters in which only they may have the breadth of knowledge necessary is unsupportable.

In addition to an unconstitutional deprivation of effective counsel, the distinction between classes of attorneys based solely on their status of employment arguably denies those attorneys due process of law as guaranteed by the fifth[115] and fourteenth[116] amendments. Although the court of appeals in *U.S. Steel* found it unnecessary to address these

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[110]154 F.2d at 34-35 (citing Walleck v. Hudspeth, 128 F.2d 343 (10th Cir. 1942); Rice v. State, 220 Ind. 523, 44 N.E.2d 829 (1942); People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1944); Commonwealth v. O'Keefe, 148 A. 73 (Pa. 1929)).

[111]United States v. Lever Bros. Co., 193 F. Supp. 254, 257 (S.D.N.Y.), *cert. denied*, 371 U.S. 932 (1961).

[112]*Id.* In a currently pending antitrust case, Chrysler Corp. v. General Motors Corp., No. 84-0115 (D.D.C. 1984), the plaintiff 's retained counsel faces the same problem addressed in *Lever Brothers*. If the input from Chrysler's in-house co-counsel is denied for discovered information, retained counsel will be greatly disadvantaged. Chief outside counsel said, " 'If I were to see in their [G.M. and Toyota's] papers that the joint venture cars were going to have electronic dashboards it wouldn't mean anything to me, but the [in-house counsel] would know it had been three years on the drawing board, and thus could be evidence of antitrust problems arising from . . . the G.M.-Toyota agreement.'" Legal Times of Washington, July 9, 1984, at 4, col. 1.

[113]Securities and Exch. Comm. v. Higashi, 359 F.2d 550, 553, n.5 (9th Cir. 1966).

[114]Freeman v. C.M.I., 689 F.2d 715, 720 (7th Cir. 1982).

[115]U.S. CONST. amend. V, which states in part: "nor be deprived of life, liberty or property, without *due process of law*. . . ." (emphasis added).

[116]U.S. CONST. amend. XIV, § 1, which states in part: "nor shall any State deprive any person of life, liberty, or property, without *due process of law*; nor deny any person within its jurisdiction the *equal protection of the laws*." (emphasis added).

questions, the C.I.T. denied U.S. Steel its fundamental constitutional rights. The C.I.T.'s creation of two separate classes of attorneys, which essentially prohibits the practice of one group before the court, violates the fifth amendment.[117] In a very early case, the Supreme Court struck down arbitrary restrictions on the practice of law, invalidating a federal statute that prohibited Confederate sympathizers from litigating in the federal courts.[118] Additionally, California and New Mexico were found to have violated the due process clause of the fourteenth amendment when they indiscriminately announced a rule denying former Communist party members admission to the bar.[119] The Court expounded further that except for valid reasons, a person cannot be kept from practicing law.[120] Through reliance only upon perceptions unfounded in fact, the C.I.T. likewise denied due process to in-house counsel by summarily denying them access to confidential information and effectively prohibiting them from practicing before the court. Although the court of appeals did not address the due process questions in *U.S. Steel*,[121] the arbitrary distinction between classes of lawyers does not pass constitutional muster and provides a sound basis for invalidating the artificial distinction.

C. Professional Responsibility

Although the C.I.T. in *U.S. Steel*[122] went out of its way to state that inadvertent, as opposed to intentional, disclosure of sensitive documents was its main concern, one of the issues brought to light by this case involved professional responsibility. Corporate attorneys do not face different ethical questions than do retained counsel, for careful analysis shows that ethical considerations are generally the same for all lawyers.

Presence of the corporate general counsel on the board of directors of his own company presents critical ethical questions.[123] The fears expressed by the C.I.T. in its recent decisions reflect the fact that confidential information held by the general counsel may be difficult to separate from his general knowledge when he attends directors' meetings that address the most intimate strategies of the company. Normally, however, a corporation wants to utilize its in-house counsel as effectively as possible, including his input at all stages of planning corporate

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[117]Schneider v. Rusk, 377 U.S. 163 (1964); *see also* Brief for Appellant at 15, n.1, U.S. Steel Corp. v. United States, 730 F.2d 1465. *See supra* text accompanying note 95.

[118]*Ex parte* Garland, 4 Wall. 333 (1866).

[119]Koenigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957).

[120]353 U.S. at 235.

[121]730 F.2d 1465.

[122]569 F. Supp. 870.

[123]*See generally, Business Judgment and Legal Advise—What is a Business Lawyer?*, 31 BUS. LAW. 457 (1975); Note, *Should Counsel to Corporations be Barred From Serving as a Director?*, 1 CORP. L. REV. 14 (1978); Note, *The Role of Corporate Counsel*, 32 RUTGERS L. REV. 237 (1979).

strategies. Consequently, chief counsel is usually present during most confidential meetings at which trade secrets, product pricing, customer lists, marketing, and long range corporate goals are discussed. While any lawyer may occasionally face a conflict of interest when acting both as legal counsel and as business manager acting on behalf of the corporation in board meetings, a wholly different issue faced the court in *U.S. Steel.*[124] The question in *U.S. Steel* was whether those problems were any different from those faced by outside counsel entrusted with the same protected information. The answer is quite clearly no, as illustrated by a recent article in Legal Times.[125] The article lists over one hundred law firms with attorneys sitting on the boards of directors of over three hundred corporations. All the firms listed received legal fees for services rendered to those companies. In 1982, the Securities and Exchange Commission listed one law firm that received almost seven million dollars in fees from one client whose board of directors included a partner of the firm.[126] More than thirty firms received fees in excess of one million dollars from similarly situated corporate clients.[127] Therefore, any presumption by the courts or administrative agencies that in-house lawyers would face different problems from outside lawyers trying to keep confidential data separate from their day-to-day business is unsubstantiated.

Any fear that unscrupulous businesses may exert pressure on in-house counsel to reveal protected information may be genuine, but that would also be true even if outside counsel represented the company. No retained firm wants to lose a valuable client any more than a corporate lawyer would want to risk his position within his company. These dilemmas confront all attorneys equally. In such a case, the court has clear authority to deny discovery to all, but, as illustrated, would have no greater reason to deny in-house counsel alone.[128]

Finally, all attorneys face the same sanctions for violations of the code of professional responsibility or for breaching a protective order. Quoting from the ABA Code of Professional Responsibility, the court in *Upjohn Co. v. United States*[129] stated, "The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client . . . facilitates the full development of facts essential to proper representation of the client . . . ."[130] An issue involving professional responsibility raised often in foreign trade cases is that foreign businessmen are skeptical of the effectiveness of protective orders and the enforcement

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[124]*See supra* note 123.

[125]Legal Times, July 25, 1983, at 7, col. 1.

[126]New York Times, Aug. 24, 1982, at 32, col. 1.

[127]Legal Times, July 25, 1983, at 7, col. 1.

[128]*See generally* Note, *Corporate Accountability and the Lawyer's Role*, 34 BUS. LAW 159 (1980); *Higher Duty: A New Look at the Ethics of the Corporate Lawyer*, 26 CLEV. ST. L. REV. 337 (1977).

[129]449 U.S. 383 (1981).

[130]*Id.* at 391.

of the code of professional ethics in this country.[131] The dissent for the court of appeals in *U.S. Steel* suggested that foreign businesses which feel they are not treated fairly by the courts may withdraw from trade or ask their governments to retaliate against United States trade.[132] While these policy considerations are beyond the scope of this paper, it should be noted that the C.I.T., in denying access to corporate counsel in *U.S. Steel*, stated that the court "does not rely on the fears of [foreign business] . . . that their confidential information may be used improperly, . . ."[133] thus tending to refute the dissenting argument in the court of appeals. All lawyers are "officers of the court,"[134] and our legal system can only operate on the presumption that all attorneys will uphold this office with integrity. Speculation cannot govern the course of action taken by the courts.

V. Alternative Approaches to the Problems Presented by *U.S. Steel*

Three principal alternatives may provide a solution to the issue of differentiation between classes of attorneys. First, the courts can make a categorical distinction between in-house and retained lawyers. Second, each case can be analyzed independently, based on the unique facts and the attorney/client relationship, to determine whether an attorney can gain access to confidential documents. Finally, the courts can reject any preemptory discrimination between retained and in-house attorneys. The following section addresses each possibility and proposes the most appropriate solution to the problem.

A. Complete Distinction Between In-house Counsel and Retained Firms

The concerns for maintaining the confidentiality of highly sensitive information and an efficient system for litigation are well noted. Throughout the development of the American legal system, the need for discovery, in order to litigate cases from a common framework of facts, has been both recognized and facilitated.[135] History shows, however, that a balancing of needs is necessary to effectuate a fair trial for all litigants. When the needs of both parties are great, the court must weigh the factors to decide if the case can proceed without the desired discovery. Historically, the burden has always been placed on the party opposing discovery to show cause why discovery should be denied. Once the court has determined that access to information is needed, it may fashion a protective order to safeguard the needs of both sides.

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[131]Legal Times, July 9, 1984, at 4, col. 1.

[132]730 F.2d at 1470 (Nichols, J., dissenting).

[133]569 F. Supp. at 873.

[134]*See supra* text accompanying note 72.

[135]Fed. R. Civ. P. 26.

Any protective order that categorically preempts one class of attorneys poses several problems. The statutes governing civil procedure do not distinguish between in-house and outside counsel and, therefore, do not support a blanket distinction.[136] Substantive proof must be established in order to arrive at a per se rule that would meet the federal requirements necessary to create such a rule.[137] Denial of discovery to an arbitrarily established class of attorneys based only on the intuition of the court must yield to constitutional mandates and a plethora of cases upholding a party's right to effective counsel of his choice. The International Trade Commission admitted: "If the Department of Justice position [denouncing any per se rules] prevails and this Court's opinion is expressed in general terms, it is possible that the Commission's rule will fall as well."[138] These factors show that indiscriminate classifications of lawyers cannot align with any accepted legal theory. Thus, any rule which establishes a per se distinction between in-house and retained attorneys is unacceptable.

B. Case-by-Case Analysis

The second possible approach to the issue presented in *U.S. Steel*[139] is the independent analysis of each case in which the need for discovery clashes with the need for confidentiality of sensitive documents. In vacating the C.I.T.'s decision in *U.S Steel*, the court of appeals outlined a procedure designed to solve the problem.[140] This procedure, however, has several weaknesses.

The test set forth by the appellate court based accessibility to confidential material on the relationship between the clients and their counsel, as well as on the actual services performed by counsel. Many outside counsel advise their clients on a continuing basis about day-to-day business decisions, as well as representing them in isolated litigation. In doing so, many firms have developed longstanding relations with clients. Such firms are generally quite knowledgeable about business matters which might relate to the sensitive information in question. On the other hand, some corporations with large in-house staffs specializing in areas like litigation, tax, patents, and labor utilize their legal departments almost as if they were outside firms. In-house counsel might even be located in different cities and have no involvement with trade secrets or in developing corporate strategies. Therefore, any counsel who has extremely close interaction with his client might be denied discovery based on the

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[136]*See supra* text accompanying notes 27-29.

[137]*See supra* text accompanying notes 88-92.

[138]Brief for International Trade Commission, United States Steel Corp. v. United States, 569 F. Supp. 870, *quoted in* Brief for Appellant at 1, United States Steel Corp. v. United States, 569 F. Supp. 870.

[139]730 F.2d 1465.

[140]*Id.*

particular facts and not simply on his label as retained or in-house counsel.

This approach to the problem would eliminate many of the problems inherent in strict segregation of corporate and outside attorneys. Deciding the issue on a case-by-case basis obviously eliminates any appearance of discriminatory per se rules. This solution would also avoid many of the previously discussed professional responsibility issues concerning potential conflicts of interest.[141] Certainly, no claims could be made that decisions were based merely on assumptions or connotations associated with the term in-house counsel. Due process rights under the Constitution might also be safeguarded if the courts based decisions to deny discovery solely on the discretion permitted them under Rule 26(c)(1) of the Federal Rules of Civil Procedure.[142]

The constitutional right and the overwhelming case law, however, which allow a party to choose *effective* counsel would still be violated.[143] In addition, the magnitude of the pretrial investigations necessary to establish the scope of the attorney/client "relationship" may be a large burden on the overcrowded court system. Judicial economy is also a necessary consideration when establishing rules with such long-range ramifications.

The most compelling argument against this procedure is the lack of uniformity in application of this highly discretionary test. No standards could be established. Our legal system has a duty to define those areas it governs. Without a definitive standard upon which clients can base their acts and decisions, they will be left in a state of uncertainty and may encounter unknown risks in choosing counsel. A complex case could be in its advanced stages, as was *U.S. Steel*,[144] when a client finds that the effectiveness of his representation is severely limited.

This ill-defined case-by-case method can be analogized to the test for attorney/client privilege, addressed by the Court in *Upjohn Co. v. United States*.[145] In *Upjohn*, the Supreme Court stated, "An uncertain [test to determine] privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[146] Chief Justice Burger, concurring in the judgment for Upjohn, stated, " '[T]he attorney and client must be able to predict with some degree of certainty whether [their rights] will be protected.' For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts."[147]

An illustration of the breadth of variations that may result if the design of protective orders is not guided by definite standards was

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[141] *See supra* text accompanying notes 35-38.

[142] *See supra* note 9.

[143] *See supra* text accompanying notes 102-14.

[144] 730 F.2d 1465.

[145] 449 U.S. 383, 391 (1981).

[146] *Id.*

[147] *Id.* at 402 (Burger, C.J., dissenting) (quoting majority opinion at 393).

presented in an antitrust case involving Chrysler, General Motors, and Toyota.[148] Chrysler sought discovery of trade-related documents held by G.M. and Toyota. After deciding that discovery was necessary to proceed with the case, the court fashioned a novel protective order which allowed only one of Chrysler's staff attorneys access to the information, in addition to Chrysler's outside co-counsel. The court order specifically excluded any other counsel. A further stipulation prohibited the in-house attorney for one year from attending any business meetings concerning product development marketing, finance, and long-term planning.[149] This order exemplifies the unpredictable and haphazard results of a lack of definite standards to guide the court.

The dissent in *U.S. Steel* discredited the case-by-case approach to the problem for similar reasons, but offered a potential solution.[150] An impartial court-appointed expert, agreed on by all parties, might gather the needed information while restricting confidential, but non-essential, information before disseminating his findings. This solution appears to be a viable alternative, but by allowing all attorneys access to the same information, this solution acutally results in discovery that is either for all or for none. Therefore, while the holding of the court of appeals in *U.S. Steel* is certainly supportable, the desired results of the test enunciated by the court would be better served by permitting no distinction between in-house and retained attorneys.

C. No Distinction Between Retained Firms and In-house Counsel

The final and most attractive alternative is the equal treatment of all attorneys with no distinctions between classes of lawyers regarding access to confidential material. It must be remembered that the court always has the discretion to prevent any discovery.[151] This approach results in the fewest potential conflicts between competing interests.

The chance of inadvertent disclosure of secret information is no greater with one class of attorneys than another.[152] A corporate lawyer is no more likely to have daily involvement in business planning decisions than is a lawyer on retainer. In many cases, a corporate legal department may be a separate entity available to the corporation as a whole when needed, much like law firms with corporate clients.

All attorneys are officers of the court[153] and thus are bound by the same rules and face identical sanctions for any professional misconduct.

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[148]Chrysler Corp. v. General Motors Corp., No. 84-0115, slip op. (D.D.C. July 24, 1984).

[149]Chrysler Corporation did not appeal the lower court decision infringing on corporate counsel's right to discovery, because the nature of the case required an expeditious determination on the merits. Legal Times, July 9, 1984, at 4, col. 1.

[150]730 F.2d at 1470 (Nichols, J., dissenting).

[151]*See supra* note 9.

[152]*See supra* text accompanying notes 123-24.

[153]Appendix for Appellant at 63, U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984). The former United States Attorney General, commenting on behalf of U.S. Steel before C.I.T. Judge Watson, stated that an attorney's first obligation is to the court.

No factual basis exists for presuming that one class of lawyers faces any different temptations or pressures.

A consistent and systematic approach by the courts enable the practicing attorney to know with greater certainty what to expect from a court. Thus, discretionary decisions ungoverned by standards or precedent can be avoided. Uniform disposal of cases also prevents the business community and the public at large from viewing this distinction between attorneys as an act by the profession to inhibit competition and prevent companies from utilizing the most cost-effective legal services available. The constitutional due process right is not breached by this method, and the long history of cases supporting one's right to effective counsel of his choosing is not contravened.

Perhaps over time, as with many "rules" of law, exceptions may be discovered for which allowances must be made. However, at this embryonic stage of development of this conflict, a more rigid approach should be followed by the courts and administrative agencies. Policy considerations and the weight of the law require an unwavering refusal to discriminate between classes of attorneys.

The *U.S. Steel* decision will create long-range ramifications if this alternative, which prevents discrimination between classes of attorneys, is not adopted. The important decision by the appellate court to overturn the arbitrary per se classification of in-house counsel should have great impact as precedent, but may be interpreted too narrowly. By failing to address several questions,[154] the court left the door open to future unwarranted discrimination by the International Trade Commission. Until the legislature eliminates section 207.7 of the Customs Duties Act,[155] or the courts rule that prohibiting the C.I.T.'s arbitrary distinction between classes of attorneys requires the invalidation of section 207.7, inconsistent treatment of parties by administrative and regulatory agencies will continue. Case-by-case analysis of lawyer/client relations could eventually confound the courts with inconsistent rulings and overtax the courts' valuable time.

This distinction between attorneys arose in the context of a very specific issue, namely confidential discovery under protective orders. Over time, however, the differences might be extrapolated to create broadly sweeping distinctions with unpredictable consequences. Any disenfranchisement of corporate lawyers as a class, even if only in administrative hearings, may in time render in-house legal service ineffective.

VII. Conclusion

It is evident from a review of the statutory background pertinent to the issue of discovery that a party's legal representative historically has

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[154] *See supra* text accompanying notes 58-62.

[155] *See supra* notes 30-32.

not been barred from discovery on the basis of his employment status.[156] The amendments to the rules have not altered the legislative intent behind the rules.[157]

Per se exclusionary rules have generally been disfavored by the Supreme Court, and the Justice Department's clear position is against any rules such as those used by the International Trade Commission and the C.I.T. Under the tests established by the Supreme Court, the C.I.T. ruling in *U.S. Steel* was unsupportable. No factual basis exists for distinguishing between classes of lawyers. The overwhelming number of cases which uphold a person's right to effective counsel support the appellate court decision in *U.S. Steel.*

The case-by-case test enunciated by *U.S. Steel* still faces major obstacles presented by the due process provisions of the Constitution, and may require very time-consuming, decision-delaying, pretrial investigation. The approach which categorically distinguishes between in-house and retained attorneys is contrary to common law, fails the test for an acceptable and legal per se rule, and does not meet constitutional muster. This Note, therefore, proposes that the federal courts adopt a posture which treats all lawyers equally in the consideration of discretionary discovery orders, as well as in other instances where the inconsistent treatment of attorneys might arise.

MARK A. KAPOURALOS

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[156]*See supra* notes 3, 6-20 and accompanying text.

[157]*See supra* note 13 and accompanying text.

The Interest of the Child in the Home Education Question: *Wisconsin v. Yoder* Re-examined

I. Introduction

In recent years, an unprecedented number of parents have chosen to educate their children at home, a practice which currently shows no sign of subsiding.[1] Home education today may be viewed as something of an anomaly, given the rise of full-time working parents in both one-parent and two-parent households. The popularity of home education may, however, be attributed to a number of reasons, the most significant of which are the perceived inadequacy of the public schools and the rise of religious fundamentalism in the United States.[2]

Parents who make this choice sometimes run afoul of state compulsory education statutes which typically require attendance at a public or private school or an "equivalent."[3] A number of cases arising from this conflict have been litigated, the decision of primary importance coming in 1972 when the United States Supreme Court decided *Wisconsin v. Yoder*.[4] The Court, in responding to a circumstance quite different from most home education situations today,[5] determined that the conflict

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[1]Lines, *Private Education Alternatives and State Regulation*, 12 J. Law & Educ. 189 (1983).

[2]*Id.* at 193.

[3]Some state statutes simply require attendance at a public or private school, without mentioning other alternatives. *See infra* note 12 and accompanying text. Others provide for alternatives that are "equivalent" to public or private education. Still other statutes are more specific in detailing what will qualify as an equivalent. These equivalency requirements typically include teacher certification, teacher "qualification," minimum number of instructional hours, or coverage of certain subjects. Virginia and Kentucky exempt parents who conscientiously object to sending their children to school from the compulsory attendance requirement. Mississippi dropped its compulsory education statute following *Brown v. Board of Education* (*see infra* note 88), apparently to avoid forcing children to attend desegregated schools. For an outline of the relevant statutes of all the states, see Note, *Home Instruction: An Alternative to Institutional Education*, 18 J. Fam. L. 353, 379-81 (1980).

Because most states permit home education under certain circumstances, parents who teach their children at home are not necessarily in violation of the attendance statutes. Furthermore, state courts and prosecutors may be lenient in interpreting standards of equivalence. For these reasons, litigation normally occurs in states where there is no home education option, or when parents fail to meet a prescribed requirement and contest the state's power to impose the requirement.

[4]406 U.S. 205 (1972).

[5]The Amish parents in *Yoder* were adherents to a faith that encompassed not only religious values, but community, social, and economic life as well. In contrast, most religious fundamentalists today do not intend to isolate themselves entirely from the rest of society. *See, e.g.*, Burrow v. State, 282 Ark. 479, 669 S.W.2d 441 (1984).

was to be resolved by balancing the free exercise of religion rights of the parents against the interest of the state in compulsory school attendance.[6]

The thesis of this Note is that, while courts have continued to seek guidance from *Yoder* in ruling on home education controversies for the last thirteen years, the case provides an incomplete, unworkable standard. Alternatively, the *Yoder* holding is quite narrow and should be confined to its facts, thus creating the need for courts to formulate their own responses to the controversies that promise to arise in the future. The inadequacy of *Yoder* as authority in home education litigation is reflected in subsequent state and lower federal court decisions which awkwardly circumvent the *Yoder* test or announce holdings difficult to reconcile with *Yoder's* majority opinion. The primary source of this problem stems from the *Yoder* majority's failure to recognize the child's interest as a factor in the balancing test when the rights of parents conflict with the interests of the state. Furthermore, the *Yoder* balancing test has become untenable in light of other Supreme Court decisions which have at least implicitly recognized the importance of education to the child, irrespective of any rights of the parents or interests of the state.

It is important to note that the Court in *Yoder* dealt with a free exercise of religion[7] assertion of the parents, which distinguishes it constitutionally from those situations where parents, for purely academic, social, or other reasons, seek to educate their children at home. Because free exercise is recognized as a fundamental right, the state's interest must be compelling to outweigh it.[8] Apart from a free exercise assertion, the choice of the parent in educating a child has generally been held not to be a fundamental right.[9] Consequently, the state must demonstrate only that it acted reasonably in requiring children to attend school.[10]

Some courts have relied upon *Yoder* absent any free exercise claim of the parents, which, not surprisingly, has led to disparate results. This has prompted some scholars to maintain that a secular equivalent of *Yoder* is needed and could be premised on a parental right to privacy.[11]

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[6]*Yoder*, 406 U.S. at 220-21.

[7]U.S. CONST. amend. I.

[8]*Yoder*, 406 U.S. at 214. *See also* Delconte v. State, 308 S.E.2d 898 (N.C. App. 1983), *rev'd on other grounds*, 329 S.E.2d 636 (N.C. 1985).

[9]San Antonio School District v. Rodriguez, 411 U.S. 1, 40 (1973); Hanson v. Cushman, 490 F. Supp. 109, 114 (W.D. Mich. 1980); Scoma v. Chicago Board of Education, 391 F. Supp. 452, 461 (N.D. Ill. 1974). *But see* State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). (In *Whisner*, the court suggested that the right of the parent to choose the means of educating the child was fundamental and not necessarily tied to a religious assertion.)

[10]*See supra* notes 8-9.

[11]Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child*, 18 WILLIAMETTE L. REV. 563 (1982); Comment, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. REV. 191 (1981). A similar argument, however, was recently rejected in a state court. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (1983).

If that premise were accepted, under standard constitutional analysis, the state would be required to demonstrate a compelling interest in compulsory attendance, regardless of the parents' reason for insisting on home education.

Not all defenses of home education have been based on free exercise rights. Another approach by parents that has met with some recent success in two state courts is the argument that statutes which prescribe criminal sanctions for parents who do not send their children to public or private schools are unconstitutionally vague because the statutes are unclear on whether education at home qualifies as private schooling.[12] It should be noted, however, that a number of states have categorically refused to recognize home education as private schooling, therefore placing the general viability of this argument in doubt.[13] Furthermore, the defense of unconstitutional vagueness could be nullified by legislative reaction.[14]

For the primary purposes of this Note, however, most discussion will be limited to those cases involving a parental assertion of free exercise rights to excuse noncompliance with compulsory attendance statutes. This was the assertion considered by the Supreme Court in *Wisconsin v. Yoder*, and because so much of the increase in home education today is attributable to the rise of religious fundamentalism, examination of this subject is particularly worthwhile.[15]

II. Background

Prior to *Wisconsin v. Yoder*, Amish parents had been generally unsuccessful in similar challenges to state compulsory education statutes.[16] The courts had relied on the "belief/action" distinction set out by the

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[12]Roemhild v. State, 251 Ga. 569, 308 S.E.2d 154 (1983); State v. Popanz, 112 Wis. 2d 166, 332 N.W.2d 750 (1983).

[13]Burrow v. State, 282 Ark. 479, 669 S.W.2d 441 (1984); *In re* Shinn, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961); F. & F. v. Duval County, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973); State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *appeal dismissed*, 389 U.S. 51 (1967); State v. Lowry, 191 Kan. 701, 383 P.2d 962 (1963); City of Akron v. Lane, 65 Ohio App. 2d 90, 416 N.E.2d 642 (1979); State v. Riddle, 285 S.E.2d 359 (W. Va. 1981).

[14]Indeed, the statutes of most states do not limit attendance to only public or private schools, but allow for "equivalent" education or schooling that meets certain prescribed standards. Therefore, this argument would not be available in many circumstances. *See supra* note 3.

[15]Furthermore, parents who choose to educate at home for non-religious reasons often are not in violation of statutes that allow non-institutional alternatives so long as certain standards (certification or subject requirements, for example) are met. In the free exercise context, however, parents often argue that they should not be bound by "equivalency" requirements. *See infra* notes 111-31 and accompanying text.

[16]State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), *appeal dismissed*, 389 U.S. 51 (1967); State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951).

Supreme Court in *Cantwell v. Connecticut*[17] to find that two concepts were embraced in the constitutional right of religious liberty — freedom to believe and freedom to act — and that while the former freedom was absolute, the latter was subject to state regulation for the protection of society.[18] These courts held, therefore, that while the Amish were free to hold any belief they wished, the state could justifiably limit the right of the Amish to act on their beliefs and could require that their children attend school beyond eighth grade. This distinction was similarly employed to restrict the practices of parents of other faiths in removing their children from school or in providing education at home or in private schools that failed to conform to state-imposed standards.[19] These courts also relied on the concept of the state acting as *parens patriae*, or in the place of the parents.[20] In other words, the state could act to guard the general interest in the child's well-being, therefore giving the state power to limit parental freedom and authority in matters affecting a child's welfare.[21]

In 1972, however, the Supreme Court abandoned its belief/action distinction in the context of education. *Wisconsin v. Yoder* involved a situation not unlike those to which the belief/action distinction had earlier been applied. The Yoders were Old Order Amish who had been convicted under Wisconsin's compulsory education statute. They maintained that the established practice of their religion called for the children to leave school after eighth grade and to receive religious, agricultural, and domestic instruction at home. In finding the attendance statute unconstitutional as applied to these parents, the Supreme Court cited the long-established Amish tradition and the fear on the part of the parents that exposing the children to "worldly influences" in high school could result in Amish children leaving the faith and in the ultimate collapse of their religious order. In addition, the Court cited authority establishing firmly the right of the parents to direct the religious upbringing of their children in relation to education.[22]

The Court relied primarily on two cases which it found to articulate a constitutional parental right in this area: *Meyer v. Nebraska*[23] and *Pierce v. Society of Sisters*.[24] In *Meyer* the Court had struck down a state statute which prohibited the teaching of any language but English

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[17]310 U.S. 296 (1940).

[18]*Id.* at 303-04.

[19]Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955); People v. Donner, 199 Misc. 643, 99 N.Y.S.2d 830 (1950), *aff'd*, 278 A.D. 705, 103 N.Y.S.2d 757, *aff'd*, 302 N.Y. 857, 100 N.E.2d 48, *appeal dismissed*, 342 U.S. 884 (1951); Commonwealth v. Bey, 166 Pa. Super. 136, 70 A.2d 693 (1950).

[20]*See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944).

[21]The state had also relied on this principle in *Yoder*, but the Court refused to extend it to that situation. 406 U.S. at 229-34.

[22]*Yoder*, 406 U.S. at 215-29. Not all courts have abandoned the belief/action distinction, however. *See* State v. Shaver, 294 N.W.2d 883 (N.D. 1980).

[23]262 U.S. 390 (1923).

[24]268 U.S. 510 (1925).

prior to eighth grade. Among other things, the Court had said that the statute infringed on the rights of parents to engage a teacher to instruct their children in another language.[25] Additionally, *Pierce* had held unconstitutional an Oregon statute that required parents to send their children to public schools. The Court had found that the statute, by excluding the option of sending children to private schools, unreasonably interfered with the right of the parents in directing their children's upbringing.[26]

In *Yoder*, the Court also discussed at length the success enjoyed by the Amish in preparing children for the Amish way of life.[27] Indeed, the Court suggested that the state's interest in compelling attendance was satisfied by the instruction the Amish provided their children, a suggestion that had drawn a vociferous attack in the dissent to the state supreme court decision.[28] Nevertheless, the Court maintained that the question of whether an attendance statute is unconstitutional when applied to particular parents rests on a balancing test in which the free exercise of religion rights of the parents will be weighed against the state's interest in compulsory attendance.[29]

A concurring opinion written by Justice White and joined by Justices Brennan and Stewart recognized that some Amish children might choose not to continue in that way of life. Those Justices would have expanded the scope of the state's interest to include development of other talents or lifestyles that the child might choose.[30]

Justice Douglas, dissenting in part,[31] was more emphatic in stating that the child has a protectible right and interest wholly separate from that of the state or the parents.[32] Douglas proclaimed:

> It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of

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[25]262 U.S. at 398.

[26]268 U.S. at 535. The actual holding in *Pierce* was not, however, premised on the parental right, but on the due process clause. The Court found that the Oregon statute was violative of due process because it would destroy the private schools' business. This distinction is significant because the Supreme Court later abandoned the due process clause as a means of overturning social and economic legislation. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Nevertheless, the Court continues generally to rely on *Pierce*, viewing it instead as an affirmation of parental rights. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 178 n.15 (1976).

[27]406 U.S. at 210-13.

[28]State v. Yoder, 49 Wis. 2d 430, 451, 182 N.W.2d 539, 549 (1971) (Heffernan, J., dissenting). The dissenting judge argued that the state's interest and obligation runs to every child, and that the court could not, therefore, abdicate the state's interest in even a few students. *Id.*

[29]406 U.S. at 220-21.

[30]*Id.* at 239-40 (White, J., concurring).

[31]*Id.* at 241 (Douglas, J., dissenting).

[32]*Id.* at 245-46.

> diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.[33]

III. Parents, Child, and State: the Competing Interests[34]

The majority, concurring, and dissenting opinions of *Yoder* demonstrate that there are three interests potentially involved in the home education question. The discussion that follows outlines these interests and shows how they sometimes can differ.

A. The Parental Right

First, it is significant to note that the early literature of the common law spoke of the legal *duties* of the parent to the child, rather than the *rights* of parents in directing their children's upbringing. Blackstone stated that the most important duty resting upon parents was to give their children "an education suitable to their station in life,"[35] but he also observed that "the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children."[36] Even *Meyer v. Nebraska*, upon which the Supreme Court relied in *Yoder* to establish the parental right to direct the child's upbringing, also spoke of the natural duty of the parent to provide a substantial education.[37] The shift in focus from parental duties to rights in the development of the common law is based primarily on the concept of the child as property.[38] Under the early common law, children had the status of paternal chattel. Children owed services to the father, just as households had owed services to the barons in feudal society.[39]

The emphasis on parental rights can also be seen outside the context of education or religion, most notably in those cases involving parental

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[33]*Id.* Douglas's dissent raises a number of questions regarding the child's right of self-determination, and implicit in his position is a value judgment on Amish tradition. Furthermore, all education, whether public, private, or at home, involves the instilling of values, but Douglas seems simply to have equated the values which the state would deem appropriate and the values the child would adopt if given the right of self-determination.

[34]This Heading is not interposed to suggest, of course, that these interests are always adverse.

[35]1 Commentaries 451 (T. Cooley ed. 1899).

[36]*Id.*

[37]262 U.S. at 400.

[38]*See generally* Watson, *The Children of Armageddon: Problems of Custody Following Divorce,* 21 Syracuse L. Rev. 55 (1969).

[39]*Id.*

consent or notice for a minor's abortion or use of birth control, where the Supreme Court has relied on the penumbral right to privacy.[40] It should be observed, however, that parental rights in this area are not absolute and may give way, at some point, to the interest of the state and to the liberty interest of the child.[41]

B. The Interests of the State and the Child

In addition to the interest of the parent, the *Yoder* balance recognized the interest of the state in mandating school attendance for the promotion of an effective citizenry and for the economic well-being of society.[42] Indeed, the assertion of a fundamental right by a parent may, in come circumstances, give way to this interest.[43] This state interest in education has been suggested to extend to both academic preparation and socialization.[44] In other words, the promotion of an effective citizenry and the economic well-being of society may call for the state to regard socialization of children as a legitimate aim of education. It has been pointed out, however, that if socialization is recognized as a legitimate state objective, then it cannot be accommodated by the proliferation of home education.[45] Therefore, parents seeking to educate their children at home may be given the additional burden of showing that their children are becoming well-adjusted socially, not just that they have mastered certain academic subjects. At the very least, this consideration would tip the balance heavily in favor of the state's interest when the *Yoder* test is employed.

It has been posited that recognition of the child's interest in the home education question is not necessary because consideration of the state's interest is sufficient to protect the interest of the child.[46] Given the broader scope of the state's interest articulated in Justice White's *Yoder* concurrence,[47] such a position might be tenable. For a number of reasons, however, the child's interest in the matter is distinguishable from that of the state.

First, the state's interest as described by the majority in *Yoder* is a collectivist[48] interest, one which may not protect all children in all

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[40]H.L. v. Matheson, 450 U.S. 398 (1980); Bellotti v. Baird, 443 U.S. 622 (1979); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976). These rights were premised on the privacy right found in Griswold v. Connecticut, 381 U.S. 479 (1965).

[41]H.L. v. Matheson, 450 U.S. 398 (1980); Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

[42]*Yoder*, 406 U.S. at 221.

[43]*See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 162 (1944).

[44]*See generally* Note, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373 (1976) [hereinafter cited as Note, *Education and the Law*].

[45]*Id.* at 1391.

[46]*See* Stocklin-Enright, *supra* note 11, at 578.

[47]406 U.S. at 240 (White, J., concurring) (recognizing that individual children may choose another lifestyle).

[48]For an excellent exposition of the collective nature of the state's interest, see Note, *Education and the Law*, *supra* note 44. In brief, the state's interest extends to the general population, with the objective being the good of the society as a whole, and the good of the particular individual significant only insofar as it serves the general interest.

circumstances.[49] The Court, for example, failed to consider the "marginal" Amish child,[50] the one who would choose to leave the Amish community if given a real opportunity. In its analysis, the Court noted the *general* success enjoyed by the Amish; it did not focus on the best interests of a particular child. Second, because the *Yoder* balancing test recognizes only two parties in the balance, the state's ability to protect the interest of the child would decrease in proportion to the fervor of the parents' religious beliefs.[51] Third, a separate recognition of the child's interest is supported by the Supreme Court's conclusion that a child may be better protected by her own due process rights than by the state.[52]

C. *The Interests of the Child and the Parents*

Not only is the interest of the child distinguishable from the state interest, it is also distinct from that of the parents. While the common law created the presumption that a parent always acts in the child's best interest, that presumption is rebuttable.[53] A number of cases, particularly in the areas of institutional commitment of children, the right to withhold medical treatment, and parental notice or consent for a minor's abortion or use of birth control,[54] demonstrate judicial recognition of the difference that may develop between the interests of the parents and the child. In *Parham v. J.R.*, the Supreme Court found that, in a parent's decision to have a child committed to a mental institution, the child had a recognizable liberty interest which precluded absolute discretion on the part of the parents. The Court further declared that the importance of the decision warranted inquiry by a neutral factfinder to guarantee that the child's rights were not abridged.[55]

Additionally, parental rights have been curtailed for many years in such instances as the right to withhold medical treatment.[56] Developments in this area are particularly noteworthy in the home education context because, first, the parents often assert free exercise arguments,[57] and

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[49]*See generally* Note, *Education and the Law*, *supra* note 44.

[50]Knudsen, *The Education of the Amish Child*, 62 CALIF. L. REV. 1506, 1515 (1974).

[51]The irony is that it may be in these cases that the child's interest is in greatest need of protection. Parents who embark on home education primarily for academic reasons are more likely to be qualified to provide their children an equivalent or superior education. *See supra* note 15.

[52]*In re* Gault, 387 U.S. 1 (1967).

[53]Parham v. J.R., 442 U.S. 584, 602 (1979).

[54]*See supra* note 40.

[55]442 U.S. at 602.

[56]People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); *In re* Clark, 21 Ohio Op. 2d 86, 185 N.E.2d 128 (1962); State v. Perricone, 37 N.J. 462, 181 A.2d 751 (1962). This issue has received increased attention recently as members of a few Christian fundamentalist sects withhold medical treatment from their children, sometimes resulting in criminal conviction.

[57]*See supra* notes 9-10 and accompanying text. These cases involved free exercise assertions.

second, there is evidence that these same parents are also beginning to remove their children from school.[58]

An older case involving a free exercise claim is significant in distinguishing the interests of the parent and child. In *Prince v. Massachusetts*,[59] the Supreme Court held that a guardian's free exercise claim would not outweigh the state's interest in enacting child labor laws in a situation where the child was selling religious literature (supplied by her guardian) on the street. The Court said, "Parents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children."[60] With that, the Court recognized that the interest of the child is not simply consumed by the religious assertion of the parent, even when the dangers are less tangible than those accompanying the withholding of medical treatment.

In a similar vein, the courts have recognized that the desires of the parents may not mirror the interests of the children in the context of education. This recognition has continued, even after *Wisconsin v. Yoder*, resulting in a more express recognition of the child's interest. Just two years following *Yoder*, the federal district court in *Davis v. Page*[61] maintained, "The interests of the children are not co-terminous with that of their parents. The children have conflicting interests."[62] In *Davis*, parents argued that their family's faith made it a sin to view audio-visual presentations, to study music, dance, or philosophy, or to receive guidance counseling at school. The parents sought to require school officials to excuse their children during such activities.[63] In denying the parents' petition, the district court concluded that allowing the children to leave during these activities would have an adverse effect on *their* education, and that a child's right to receive a proper education had to be weighed in the balance.[64]

The *Davis* court attempted to distinguish *Yoder* by pointing out that, unlike *Yoder*, elementary children were involved who would one day be expected to seek employment in the public sector.[65] The court, however, quoted at length from Justice Douglas's *Yoder* dissent,[66] which emphasized the child's rights. For this reason, it is difficult to maintain that the court did no more than distinguish *Yoder*. Furthermore, it is difficult to ascertain from the *Yoder* majority opinion how this alteration of facts should yield a different conclusion, because the simple balancing test does not clearly include recognition of these other factors.

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[58]News report, *The Today Show*, Sept. 25, 1984.
[59]321 U.S. 158 (1944).
[60]*Id.* at 170.
[61]385 F. Supp. 395 (D.N.H. 1974).
[62]*Id.* at 398.
[63]*Id.*
[64]*Id.* at 399-400.
[65]*Id.* at 400.
[66]*Id.* at 398.

In *Hanson v. Cushman*,[67] another federal district court distinguished the interest of the child. In so doing, the court noted Justice White's concurrence in *Yoder*: "*Pierce v. Society of Sisters* [citation omitted], lends no support to the contention that parents may replace state education requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society."[68]

Another means by which a court has avoided the exclusion of the child's interest in the *Yoder* balance is illustrated in a 1983 state court decision. In *Delconte v. State*,[69] parents who had become associated with a fundamentalist Christian group argued that they believed the Bible commands parents to teach and train their children at home.[70] The North Carolina appeals court, however, refused to recognize this assertion as a free exercise claim but only as a philosophical or "sociopsychological" choice that did not merit first amendment protection.[71] Significantly, though, the Supreme Court of North Carolina recently reversed the court of appeals.[72] The supreme court determined that under North Carolina's compulsory attendance statute, the education provided at home by the parents constituted a "school."[73] It therefore did not address the question that had been considered by the lower court, i.e., whether the attendance statute violated the parents' free exercise rights.[74] Assuming, however, the continuing validity of the lower court's reasoning on the free exercise contention, its decision suggests that courts may circumvent *Yoder* by imposing very strict standards on what can be considered a free exercise claim.

Also in 1983, a federal appeals court arguably moved even further from a strict *Yoder* analysis. In *Duro v. District Attorney*,[75] a parent initiated an action against North Carolina, alleging that his religious beliefs were infringed by the state compulsory school attendance law. Peter Duro, a Pentecostal, had refused to enroll his five children in school, contending that exposing his children to others who did not share his religious beliefs would corrupt them. He was particularly concerned about what he termed the promotion of "secular humanism" and "the unisex movement where you can't tell the difference between boys and girls."[76]

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[67]490 F. Supp. 109 (W.D. Mich. 1980).

[68]*Id.* at 113.

[69]308 S.E.2d 898 (N.C. App. 1983), *rev'd on other grounds*, 329 S.E.2d 636 (N.C. 1985).

[70]*Id.* at 900.

[71]*Id.* at 904.

[72]329 S.E.2d 636 (N.C. 1985).

[73]*Id.* at 641.

[74]*Id.* at 638.

[75]Duro v. District Attorney, Second Judicial District of North Carolina, 712 F.2d 96 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 998 (1984).

[76]*Id.* at 97.

The court did not question the sincerity of Duro's religious beliefs and gave no indication that it accorded his free exercise claim any less weight than that given the Amish parents in *Yoder*.[77] As in *Davis*, however, the court attempted to distinguish *Yoder* on the basis of its factual context.[78] More significantly, though, the court went beyond *Yoder* in three other ways. First, it took a more expansive view of the state's interest served by school attendance, a view which seems to incorporate the concerns expressed in Justice White's *Yoder* concurrence. It found that "the children's future well-being . . . tips [the balance] in favor of the state."[79] Second, the court appears to have placed the burden squarely on the parent to demonstrate, not only the validity of the free exercise assertion, but also that home education would entirely satisfy the compelling interest of the state.[80] Finally, the court explicitly stated that it was considering the interests of the children: "[W]e hold that the welfare of the children is paramount and that their future well-being mandates attendance at a public or non-public school."[81] The court also noted a section of the North Carolina state constitution which provides that "[t]he people have a right to the privilege of education and it is the duty of the State to guard and maintain that right."[82]

That the majority opened new avenues in its analysis is further demonstrated by the alarm expressed by the concurring judge who agreed with the result only on the basis of the factual distinctions from *Yoder*, but maintained that the majority opinion otherwise strayed too far from the *Yoder* balance.[83] The concurrence did not agree that the provision in the state constitution could be added to the scales in balancing first amendment rights.[84] Second, the judge found the inference that a court should consider the child's interest was in contradiction to the "delicate balance" between parental rights and state interests established in *Yoder*.[85] The majority's departure from *Yoder* has not escaped notice in the academic realm as well.[86]

IV. Constitutional Right to an Education

While *Duro* leaves unsettled the question of precisely what effect a state constitutional provision will have on the *Yoder* balance, a holding

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[77]*Id.*

[78]*Id.* at 98.

[79]*Id.*

[80]*Id.* at 99. The burden of proof question is an issue that has developed in this type of controversy. Where the burden lies — on the parents or on the state — may be determined by subtle differences in statutory language. *See* Lines, *supra* note 1, at 212-14.

[81]712 F.2d at 99.

[82]N.C. Const. art. I, § 15.

[83]712 F.2d at 99 (Sprouse, J., concurring).

[84]*Id.* at 100.

[85]*Id.*

[86]*See, e.g.*, Note, *Compulsory Education: Weak Justifications in the Aftermath of* Wisconsin v. Yoder, 62 N.C.L. Rev. 1167 (1984).

by the Supreme Court that a person has a federal constitutional right to an education would necessarily elevate the child's interest to a level that must be weighed in the balancing test. Such a conclusion is indicated by a line of cases which maintain that constitutional rights attach directly to children.[87]

In the landmark school desegregation case, *Brown v. Board of Education*,[88] the Supreme Court repeatedly emphasized the importance of education to the individual. In an oft-quoted passage the Court maintained:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[89]

In 1973, the Supreme Court had occasion to consider the precise question of whether a person has a constitutional right to an education in *San Antonio School District v. Rodriguez*,[90] a challenge to the means by which Texas public schools are funded. Despite the strong language in *Brown*, as well as other similar pronouncements the Court had made, it declined to recognize education as a fundamental right.[91] Strong dissents on that issue were registered by Justice Brennan and Justice Marshall. Brennan objected to the inference that a right can be deemed fundamental only if explicitly or implicitly guaranteed by the Constitution.[92] Marshall constructed an elaborate argument for the recognition of a fundamental right.[93] Along the lines suggested by Brennan, Marshall pointed out that the rights to procreate, vote in state elections, or appeal from criminal convictions are not found in the words of the Constitution but have nevertheless been recognized by the Court.[94] Both Justices argued that the close nexus between express constitutional guarantees and education justifies the recognition of a fundamental right to an education, given

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[87]Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines School District, 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967).

[88]347 U.S. 483 (1954).

[89]*Id.* at 493.

[90]411 U.S. 1 (1973).

[91]*Id.* at 30.

[92]*Id.* at 62 (Brennan, J., dissenting).

[93]*Id.* at 70 (Marshall, J., dissenting).

[94]*Id.* at 100.

that education is "inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment."[95] In other words, the Justices would have recognized a penumbral right to an education as the Court had recognized a penumbral right to privacy.[96]

The refusal in *San Antonio* to recognize the right to an education is also difficult to reconcile with subsequent Supreme Court decisions. For example, in *Goss v. Lopez*,[97] the Court held that students suspended from school for more than a few days have a due process right to a hearing. Moreover, the Court maintained that students facing suspension have a protected property interest in education.[98] Hence, it is difficult to reconcile Court decisions which maintain that a person has no fundamental right to an education with other decisions which recognize the potential for education as a protectible property interest.

Most notably, the Supreme Court has recently decided that the undocumented children of illegal aliens have the right to a public education. In *Plyler v. Doe*,[99] the Court acknowledged its *San Antonio* conclusion but went on to decide, on an equal protection basis, that children of illegal aliens do have the right to an education.[100] In defending this right the Court emphasized the importance of education both to the society and to the individual:

> Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . In sum, education has a fundamental role in maintaining the fabric of our society. . . .
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> . . . Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual and psychological well-being of the individual, and the obstacle it poses to individual achievement, makes it most difficult to reconcile the cost . . . of . . . denial . . . with the framework of equality embodied in the Equal Protection Clause.[101]

Arguably, *Plyler v. Doe* can be reconciled with *San Antonio*. The plaintiffs in *Plyler* were faced with *complete* deprivation of educational benefits, not just unequal and inadequate funding resulting from the system challenged in *San Antonio*. Moreover, the *Plyler* opinion did not

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[95]*Id.* at 63 (Brennan, J., dissenting).

[96]Griswold v. Connecticut, 381 U.S. 479 (1965).

[97]419 U.S. 565 (1975). Unlike *San Antonio*, which was decided on an equal protection basis, *Goss* was decided on procedural due process grounds.

[98]*Id.* at 579.

[99]457 U.S. 202 (1982).

[100]*Id.* at 221.

[101]*Id.* at 221-22.

directly contradict *San Antonio* by explicitly subjecting the state policy to the strict scrutiny that would have been warranted had the child's interest in education been deemed fundamental. Instead, the Court declared that it was employing only the rational basis test and that the statutory policy could not even withstand that scrutiny.[102] That assertion, however, is rather difficult to support. The school district had contended that the state has an interest in preserving the state's limited resources for the education of its lawful inhabitants and in deterring the influx of illegal aliens.[103] The Court actually appears to have subjected the state policy to a greater level of scrutiny, suggesting that it accorded more weight to the child's interest in education than the constraints imposed by *San Antonio* would allow.

At the very least, *Plyler v. Doe* reflects the movement away from a focus on parental rights to those of the child. It also strengthens the assertions by Justices Brennan and Marshall in their *San Antonio* dissents that education is a fundamental right by elevating the importance of education through the nexus argument. Furthermore, the Court's position in *Plyler v. Doe* that the child's interest will not be extinguished by the status or wrongdoing of the parent is difficult to reconcile with the principles reflected in the *Yoder* balancing test. In the *Yoder* balance, the state's ability to protect the interest of the child is decreased by a free exercise claim of the parents. In other words, the interest or right of the child is linked inversely to the right of the parent. This conflict is yet another example of the inequity of a strict *Yoder* balance and of the tendency of the courts to consider the interest of the child in education, irrespective of the interests or rights of parents or the state.

V. Vindication of the Child's Interest

In sum, the survey of these cases decided since *Wisconsin v. Yoder* shows that the courts have had difficulty in applying the *Yoder* balance or have simply circumvented it. This has led some to conclude that *Yoder* has had little actual impact.[104] Some courts have confined *Yoder* very strictly to its facts, readily distinguishing it from other home education situations. They have seemed not to follow its holding where the parents' religion offered anything less than a total social, religious, and economic way of life to the child so that there was little danger of future disenfranchisement or unemployment.[105] In these cases, there are few religious assertions that would weigh more heavily than the state's interest. The problem with this analysis, however, is that it provides little or no guidance for future controversies. Other courts have taken a more expansive view of the state's interest, incorporating concerns for

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[102] *Id.* at 224-30.

[103] *Id.* at 227-28.

[104] *See, e.g.*, Note, *Parental Rights: Educational Alternatives and Curriculum Control*, 36 Wash. & Lee L. Rev. 277, 284 (1979).

[105] *Id. See also* Note, *Education and the Law*, *supra* note 44, at 1398.

the child's future well-being and ability to pursue ways of life other than those dictated by the parents' faith.[106] Another means by which a court has eased the effect of *Yoder* on the child is by viewing the parents' religious motivation as something less than a free exercise claim that would trigger strict scrutiny of the compulsory attendance statute.[107] The trend indicated by *Duro* is a more explicit recognition of the child's interest and most clearly appears to be on a collision course with *Yoder.*[108] At some point, the Supreme Court will have to speak to this issue and present some clearer guidelines to which courts can more justifiably adhere in home education controversies.

Given the willingness of the courts to consider the interests of the child, or perhaps given the recognition that the child has a protectible interest in the controversy, a number of questions arise in regard to how the interest of the child might be vindicated. One solution to this problem is presented by statutes which allow home education but prescribe certain standards which the instruction must satisfy.[109] A related suggestion is that home education be supervised by state officials[110] or that the students' progress be monitored by competency testing.[111] These alternatives, however, raise significant problems, both practical and theoretical.

The most obvious practical problem with these suggestions is the enormous burden they would place on state officials. The state would be forced to monitor far more educational units,[112] thereby increasing the existing administrative and financial hardships on the public school systems. Indeed, the choice of parents to educate their children at home has been denied merely on the ground of administrative inconvenience.[113] Competency testing of students taught at home would probably present fewer administrative and economic difficulties for the state, but it also raises some problems.[114]

The most hotly-debated issues raised by these suggestions are constitutional in nature. All state compulsory attendance statutes allow the

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[106]*See supra* notes 67-68 and accompanying text.

[107]*See supra* notes 69-71 and accompanying text.

[108]*See supra* notes 75-85 and accompanying text.

[109]Note that many statutes do just that by providing for non-school alternatives that provide an "equivalent" education. *See supra* note 14 and accompanying text.

[110]*See* Stockin-Enright, *supra* note 11, at 582, 587.

[111]Indiana's former state superintendent of public instruction made such a suggestion in regard to students attending private schools. That suggestion led to a vociferous attack by the president of a fundamentalist schools association. Indianapolis Star, September 23, 1984, at 7F, col. 1.

[112]Comment, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. Rev. 191, 197 (1981). *See also* Note, *Home Instruction: An Alternative to Institutional Education*, 18 J. Fam. L. 353 (1980).

[113]Board of Education v. Allen, 392 U.S. 236 (1968).

[114]*See supra* note 111 and text accompanying *infra* note 130.

option of private schooling[115] and most also allow for home education under certain circumstances.[116] In both cases, however, the states have imposed various regulations on the non-public school alternatives. These regulations typically focus on the required minimum number of days in school per year, qualifications of teachers, coverage of certain subjects, and specifications for facilities.

This regulation of non-public school alternatives has met vigorous opposition by various religious groups maintaining parochial schools or conducting home education, on the grounds that state regulation results in excessive government entanglement with religion and infringement on their free exercise rights.[117] In the main, these challenges have not been successful.[118] For example, a number of well-publicized cases have arisen in Nebraska in recent years. In 1981, a church operating a non-approved school challenged the state's right to impose standards on the school, particularly the requirement that the teachers be certified. The Nebraska Supreme Court upheld the state's authority.[119] A related case gained nationwide attention when the leader of the church school was imprisoned and the school doors padlocked by state officials.[120] Nebraska courts have, nevertheless, continued to maintain the position that state standards must be upheld.[121] The Nebraska courts have also applied this finding in the context of home education.[122]

Similarly, a Michigan court has upheld a statute imposing teacher certification requirements on parochial schools, finding that the state has a proper and compelling interest in the regulation of private education.[123]

On the other hand, there has been some indication that as the fundamentalist movement has grown, become more vocal, and wielded more influence, some courts have become more responsive to this type of challenge. Maine's federal district court, for example, has been more sympathetic to the arguments of the fundamentalist schools.[124] In *Bangor Baptist Church v. Maine Dept. of Education,*[125] the state charged the school, pursuant to the compulsory attendance statute, with inducing

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[115]This, of course, was mandated by the decision in *Pierce v. Society of Sisters. See supra* note 26 and accompanying text.

[116]*See supra* note 3.

[117]*See, e.g.*, State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

[118]*See infra* notes 119-22 and accompanying text.

[119]State *ex rel.* Douglas v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571, *appeal dismissed*, 454 U.S. 803 (1981).

[120]Sileven v. Tesch, 212 Neb. 880, 326 N.W.2d 850 (1982).

[121]State *ex rel.* Kandt v. North Platte Baptist, 216 Neb. 684, 345 N.W.2d 19 (1984).

[122]State *ex rel.* Douglas v. Bigelow, 214 Neb. 464, 334 N.W.2d 444 (1983).

[123]Sheridan Road Baptist Church v. Department of Education, 132 Mich. App. 1, 348 N.W.2d 263 (1984). *See also* State v. Rivinius, 328 N.W.2d 220 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983).

[124]These cases too have received much notoriety. The controversy was the subject of a segment on the program "60 Minutes" on September 30, 1984.

[125]576 F. Supp. 1299 (D. Maine 1983).

truancy. The court ruled that the statute could not be used to prevent an unapproved school from operating and therefore denied the injunction the state had sought.[126]

In an Arkansas federal court, an association of private but non-church affiliated day care centers challenged a state statute that exempted similar church-run day care centers from certain regulations that were imposed on non-parochial day-care centers.[127] The defendants argued that state regulation that might arguably relate to subject matter and means of instruction would amount to infringement on free exercise of religion.[128] The district court upheld the constitutionality of the statute,[129] thereby allowing the statute to impose more regulation on secular centers than on religious centers.

The significance of these developments in the realm of home education is that any requirements states attempt to place on home education, as they have on private schools, are subject to similar attack. The right of the state to monitor home education activities, particularly by means relating to teacher certification and subject matter, is vulnerable to this challenge.[130] In fact, the monitoring of home education would probably be viewed as more intrusive than state regulation of private schools.

Because any regulation of home education can be challenged on these grounds, the solution lies in a recognition of the child's interest in the home education conflict, thereby allowing a court to consider the child's interests as well as the parents' free exercise rights. At this point it is useful to return to *Yoder*. The *Yoder* majority did not absolutely rule out consideration of the child's interest in all circumstances, but it relied on technical standing grounds to maintain that the child's interest was not at issue.[131] In other words, the *Yoder* majority would have forced the child to hire her own attorney independently and bring her own action. Such a requirement is far from realistic and, beyond that, undermines the family integrity and harmony that the majority claimed to secure.[132] This position also ignores the fact that many children in this circumstance are quite young and are unable to protect their own educational interests.

Neither does Justice Douglas's dissent offer a satisfactory answer. While he argued that the child's interest should be considered, the means through which the court was to do so was to solicit the child's opinion

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[126]*Id.* at 1314.

[127]Arkansas Day Care Ass'n, Inc. v. Clinton, 577 F. Supp. 388 (E.D. Ark. 1983).

[128]*Id.* at 396.

[129]*Id.* at 398.

[130]Note that a similar challenge would not be available to parents or schools not asserting a free exercise claim.

[131]406 U.S. at 230-31.

[132]For a general discussion of the need to protect family privacy and harmony in this area, see Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. Rev. 605.

and give weight to her preference.[133] This alternative has most of the weaknesses of the majority position. Furthermore, it fails to distinguish between the child's *preference* and the child's *interest*. Using child custody cases as an analogy, a child's preference is normally solicited but is not usually the sole criterion by which a custody decision is made.[134] Instead, preference simply becomes part of the court's inquiry in achieving the best interests of the child.[135]

The analogy to custody decisions is useful as a means of vindicating the child's interest in the home education question. The "best interests of the child" inquiry should be employed by courts when parents seek to assert free exercise claims in order to excuse compliance with state compulsory attendance statutes. A number of practical questions remain regarding how a court should determine a child's best interests, including how much weight to accord the child's preference and whether separate representation of the child is necessary.[136] Nevertheless, an approach based on a consideration of the child is warranted in the home education question, even in the free exercise context, and can best be effectuated by an inquiry into the child's best interests.

Again, it is important to recognize that litigation of this matter arises only in a limited number of circumstances.[137] The contention, then, that the child's interest should be considered in a judicial proceeding does not, of itself, entail a massive amount of extra litigation. Instead, it simply adds another dimension to an already-existing inquiry.

VI. Conclusion

The growth of home education can be viewed, in many circumstances, as a positive development. It reflects the public concern about the quality of education. It is also indicative of parental participation in the education process, something educators have been linking for years to student performance.[138] In some cases, however, parents' motives for home education may be primarily religious and leave other educational objectives in a secondary position. It is incongruous and unfair that a child may be deprived of standards the state legislature has deemed

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[133]406 U.S. at 241-43 (Douglas, J., dissenting).

[134]The child's preference is normally given varying weight depending on the age and maturity of the child.

[135]*See generally* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226 (Summer 1975) for an explanation of the "best interests of the child" inquiry.

[136]For an exposition of the view that children should have mandatory representation through a guardian *ad litem* system, see Note, *"Mom, Dad, I Want to Introduce My Lawyer." The Development of Child Advocacy in Family Law*, 29 S.D.L. Rev. 98 (1984). An analogy might also be made to Parham v. J.R., 442 U.S. at 602, which provides for a neutral factfinder to protect the child's interest.

[137]*See supra* note 3.

[138]*See, e.g.*, A. Coletta, Working Together: A Guide to Parent Involvement (1977).

necessary for quality education simply on the basis of her parents' religious assertions, without any inquiry into the child's interest.

The cases decided since *Wisconsin v. Yoder* illustrate the incompleteness and unfairness of a balancing test that ignores the child's interest in the matter. They also illustrate the ways the courts have attempted to consider the child. However, as the growth of home education spawns more controversy, and probably more litigation, a more clearly-enunciated test that incorporates the interest of the child should be formulated.

DEBRA D. MCVICKER

The Pecuniary Loss Rule as an Inappropriate Measure of Damages in Child Death Cases

I. Introduction

Indiana courts have traditionally held that the amount of compensation recoverable by parents for the wrongful death of a child is limited to pecuniary loss.[1] At one time, this rule, known as the pecuniary loss rule, was followed in nearly all jurisdictions.[2] Today, however, most jursidictions have abandoned this rule because of its archaic, outmoded underpinnings in favor of a rule which recognizes the true loss to parents as the lack of the child's society, companionship, and affection.[3]

While always stating that the pecuniary loss rule applied, Indiana courts have expanded the definition of "pecuniary loss" in order to mitigate the harshness of the rule.[4] In its 1984 decision in *Miller v. Mayberry*,[5] the Indiana Court of Appeals, Second District, called a halt to the expansion that had taken place over the years. The evolution of the rule in Indiana until *Mayberry* had followed an almost universal trend of allowing greater recovery by dispensing with a strict pecuniary loss requirement.[6] It is time for Indiana to reevaluate the rule and its viability in our society, especially in light of the unfortunate reaffirmation of the rule in *Mayberry*.

This Note will examine the evolution of the pecuniary loss rule in Indiana. Further, it will demonstrate the trend in other jurisdictions in this area and discuss the measure for recovery in analogous tort situations, such as recovery for loss of parental society, recovery for loss of spousal consortium, and recovery for the loss of an unborn fetus. Finally, it

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[1]*See, e.g.*, Thompson v. Town of Fort Branch, 204 Ind. 152, 178 N.E. 440 (1931); Miller v. Mayberry, 462 N.E.2d 1316 (Ind. Ct. App. 1984), *transfer denied*, Sept. 13, 1984; Boland v. Greer, 409 N.E.2d 1116 (Ind. Ct. App. 1980), *transfer denied*, July 13, 1981; Childs v. Rayburn, 169 Ind. App. 147, 346 N.E.2d 655 (1976) (en banc), *transfer denied*, Feb. 29, 1972; Wallace v. Woods, 149 Ind. App. 257, 271 N.E.2d 487 (1971); Hahn v. Moore, 127 Ind. App. 149, 133 N.E.2d 900 (1956) (en banc), *transfer denied*, Dec. 21, 1956; Siebeking v. Ford, 125 Ind. App. 365, 122 N.E.2d 880 (1954) (en banc), *transfer denied*, Mar. 21, 1955; Southern Ind. Ry. Co. v. Moore, 34 Ind. App. 154, 72 N.E. 479 (1904); City of Elwood v. Addison, 26 Ind. App. 28, 59 N.E. 47 (1901).

[2]*See, e.g.*, Bolinger v. St. Paul & D.R. Co., 36 Minn. 418, 31 N.W. 856 (1887); City of Galveston v. Barbour, 62 Tex. 172 (1884).

[3]*See infra* note 83 and accompanying text.

[4]*See* Childs v. Rayburn, 169 Ind. App. 147, 156-57, 346 N.E.2d 655, 662 (1976), *transfer denied*, Nov. 4, 1976; Wallace v. Woods, 149 Ind. App. 257, 267-68, 271 N.E.2d 487, 493 (1971) (en banc), *transfer denied*, Feb. 29, 1972; Hahn v. Moore, 127 Ind. App. 149, 158, 133 N.E.2d 900, 904 (1956)(en banc), *transfer denied*, Dec. 21, 1956.

[5]462 N.E.2d 1316 (Ind. Ct. App. 1984), *transfer denied*, Sept. 13, 1984.

[6]*See infra* note 83 and accompanying text.

will conclude that the pecuniary loss rule is outmoded, does not address the true loss to parents, and, therefore, should be abolished.

II. Evolution of the Pecuniary Loss Rule in Indiana

The pecuniary loss rule developed at a time when child labor was extremely common, and the death of a child was a genuine financial loss to the parents.[7] The expectations of parents for financial contributions by their children were so widespread and acceptable that the law implied a pecuniary loss to parents for which compensation could be awarded.[8] Because of the common practice of child labor and the parents' financial expectations, measuring loss to the parents in pecuniary terms was a logical way to redress their injury for the loss of a child. Thus, the early Indiana cases followed a very strict application of the pecuniary loss rule.[9] In *City of Elwood v. Addison*,[10] "pecuniary loss" was defined as "the value of a child's services from the time of the death until he would have attained his majority taken in connection with his prospects in life, less the cost of his support and maintenance during that period, including such as board, clothing, schooling and medical attention."[11] Recovery for pecuniary loss must therefore be offset against any moneys that would have been expended for the upbringing of the child but for the wrongful death of the child.

Indiana embraced the pecuniary loss rule in 1859 in *Ohio & Mississippi Railroad Co. v. Tindall*.[12] The Indiana Supreme Court more recently reaffirmed its adherence to the rule in 1931 when it decided *Thompson v. Town of Fort Branch*.[13] In *Thompson*, the father of a seventeen-year-old boy sought to recover for lost services and funeral expenses.[14] The jury returned a verdict for the father, but awarded him only one dollar in damages.[15] The court maintained that the injury to the father was an injury to a property right, and not to the father's person.[16] The court also recognized that a strict application of the pecuniary loss rule did not allow a jury to consider loss of comfort or society, or any physical or mental suffering sustained by the parent, as

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[7]*See* Comment, *Damages for the Wrongful Death of Children*, 22 U. Chi. L. Rev. 538 (1955) for a general discussion of the early roots of the pecuniary loss rule and its relation to child labor.

[8]City of Elwood v. Addison, 26 Ind. App. 28, 35, 59 N.E. 47, 49 (1901).

[9]*See, e.g.*, Cleveland, C.C. & St. L. Ry. Co. v. Miles, 162 Ind. 646, 70 N.E. 985 (1904); Louisville, N.A. & C. Ry. Co. v. Wright, 134 Ind. 509, 34 N.E. 314 (1893); Pennsylvania Co. v. Lilly, 73 Ind. 252 (1881); Ohio & M. R.R. Co. v. Tindall, 13 Ind. 366 (1859); Southern Ind. Ry. Co. v. Moore, 34 Ind. App. 154, 72 N.E. 479 (1904).

[10]26 Ind. App. 28, 59 N.E. 47 (1901).

[11]*Id.* at 35, 59 N.E. at 49.

[12]13 Ind. 366 (1859).

[13]204 Ind. 152, 178 N.E. 440 (1931).

[14]*Id.* at 155-56, 178 N.E. at 441.

[15]*Id.* at 156, 178 N.E. at 441.

[16]*Id.* at 160, 178 N.E. at 443.

a measure of damages.[17] It pointed out, however, that the evidence had established a pecuniary loss to the plaintiff for which he could recover monetary damages over and above the funeral expenses.[18] Additionally, the court cited *American Motor Car Co. v. Robbins*,[19] where the supreme court conceded that the amount of damages that compensates a parent for pecuniary loss, though incalculable, could be estimated, even though this measurement bore some semblance to conjecture.[20] The *Thompson* court, noting the definition of the pecuniary loss rule in Indiana,[21] explained that cost of maintenance was deducted from the amount of recovery because of the parents' legal duty to support their children, not because the wrongdoer had benefited the parents in any way.[22]

Since the *Thompson* case, the Indiana Court of Appeals has had numerous opportunities to address this same question. In *Hahn v. Moore*,[23] the court of appeals, en banc, used the traditional definition of pecuniary loss as set out in *City of Elwood v. Addison*.[24] The court also, however, permitted an instruction that allowed the jury to consider the pecuniary value of all acts of kindness and attention that the deceased child might reasonably have rendered to his parents.[25] This was a departure from a strict reading of the pecuniary loss rule because kindness and attention are not normally considered pecuniary items. Indeed, in *Wallace v. Woods*,[26] the appellate court, again en banc, stated that "[t]he measure of damages in Indiana for a minor's death is being liberalized by the courts in an effort to meet the present day conditions."[27]

The most liberal interpretation of the rule was enunciated five years after the *Wallace* decision in *Childs v. Rayburn*,[28] where the Indiana Court of Appeals, First District, allowed a set of jury instructions that broke down compensable damages into the following categories: loss of care, loss of love and affection, loss of support and maintenance, loss of parental training and guidance, and the pecuniary value of all acts

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[17] *Id.* at 158, 178 N.E. at 442 (quoting McGarr v. National & Providence Worsted Mills, 24 R.I. 447, 460-61, 53 A. 320, 325 (1902), which had cited Louisville N.A. & C.R. Co. v. Rush, 127 Ind. 545, 26 N.E. 1010 (1891)).

[18] 204 Ind. at 161-62, 178 N.E. at 443.

[19] 181 Ind. 417, 103 N.E. 641 (1913).

[20] *Id.* at 422, 103 N.E. 641-42.

[21] *See supra* note 11 and accompanying text.

[22] 204 Ind. at 164, 178 N.E. at 444.

[23] 127 Ind. App. 149, 133 N.E.2d 900 (1956) (en banc), *transfer denied*, Dec. 21, 1956.

[24] *Id.* at 158, 133 N.E.2d at 904 (quoting City of Elwood v. Addison, 26 Ind. App. at 35, 59 N.E. at 49). *See supra* note 11 and accompanying text.

[25] 127 Ind. App. at 158-59, 133 N.E.2d at 904.

[26] 149 Ind. App. 257, 271 N.E.2d 487 (1971) (en banc), *transfer denied*, Feb. 29, 1972.

[27] *Id.* at 267-68, 271 N.E.2d at 493.

[28] 169 Ind. App. 147, 346 N.E.2d 655 (1976), *transfer denied*, Nov. 4, 1976 (overruled by Miller v. Mayberry, 462 N.E.2d 1316 (Ind. Ct. App. 1984), *transfer denied*, Sept. 15, 1984).

of kindness and attention.[29] The court also allowed an instruction by the trial court defining pecuniary loss as the deprivation of something to which the parents were legally entitled, or a deprivation of benefits which the parents in all probability would have received from the decedent had he not been killed.[30] In considering these instructions, the appellate court ruled that while the instructions did restate the law, they did not misstate it.[31]

In *Boland v. Greer*,[32] the third district appellate court ignored the interpretation by the first district in *Childs* and only considered that part which had been accepted in *Hahn* — the pecuniary value of acts of kindness and attention.[33] In *Boland*, the plaintiff specifically requested that the traditional pecuniary loss rule be abandoned in favor of recognition of loss of love and companionship.[34] The plaintiff further asserted that a failure to recognize these damages constituted a denial of equal protection.[35] The plaintiff argued that suing for the loss of a child's society was analogous to suing for loss of spousal consortium or loss of parental society for which loss of companionship and society are recoverable.[36] The court rejected the spousal consortium argument, finding that the marital relationship differed significantly from the parent/child relationship.[37] In distinguishing actions for loss of parental consortium,[38] the court noted that the child's injury also includes loss of nurture and parental guidance and training because of the parent's wrongful death.[39] One of the more notable points in this opinion, however, is a discussion of the viability of the pecuniary loss rule.[40] Although the court expressly stated that the viability of the rule was questionable, it held that it was obliged to follow the precedent established by the Indiana Supreme Court in *Thompson* and earlier cases.[41]

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[29]169 Ind. App. at 156-57, 346 N.E.2d at 662. The court also correctly allowed damages for any medical expenses the parents incurred as a result of their son's death, and funeral expenses. *Id.*

[30]*Id.*

[31]*Id.* at 159, 346 N.E.2d at 664.

[32]409 N.E.2d 1116 (Ind. Ct. App. 1980), *transfer denied*, July 13, 1981.

[33]*See supra* note 25 and accompanying text.

[34]409 N.E.2d at 1118.

[35]*Id.* at 1120.

[36]*Id.*

[37]*Id.* The court stated that the loss of sexual services is a major part of the loss of spousal consortium. There is, of course, no such element in the loss of a child's society. *Id.*

[38]For a more general look at the loss of parental consortium, see Note, *Recovery for Loss of the Injured Parent's Society*: Ferriter v. Daniel O'Connel [sic] Sons, Inc., 1981 DET. C. L. REV. 987 (1981); Comment, *A Child's Independent Action for Loss of Consortium—A Change in the Iowa Tort Scheme*, 67 IOWA L. REV. 1081 (1982).

[39]409 N.E.2d at 1120.

[40]*Id.*

[41]*Id.* See *supra* notes 9, 13-22 and accompanying text. The court also noted that the principle of stare decisis would be seriously impaired if the law could only be considered as "dependable as the most current advance sheet." 409 N.E.2d at 1120.

Following the court's statement of general dissatisfaction with the pecuniary loss rule, the appellants submitted a petition to transfer to the Indiana Supreme Court. The petition was denied,[42] but not without a vigorous and scathing dissent by Justice Hunter.[43] Justice Hunter recognized that the rule is anomalous, at odds with today's state of affairs, and without legal or factual basis except for its stare decisis value.[44] The dissenting judge quoted *Wycko v. Gnodtke*,[45] an opinion which noted that the barbarous concept of children being economic assets, traceable to the industrial development of the nineteenth century, was a reproach to justice.[46] Justice Hunter pointed out that parents do not undertake the business of parenting because it is a profit-making venture, and that the idea that children are a property right in which parents have a financial interest is abhorrent.[47] Additionally, Justice Hunter pointed out that the court had not hesitated to overrule precedent and thus change the law in other areas.[48]

In light of the dissent by Justice Hunter, it is not surprising that in 1983, the trial court judge in *Miller v. Mayberry*[49] disregarded the pecuniary loss rule and allowed damages to be awarded for lost love and affection. On appeal, the court gave a capsulized history of the pecuniary loss rule in Indiana,[50] noting specifically the *Thompson*,[51] *Hahn*,[52] *Childs*,[53] and *Boland*[54] decisions.[55] After reviewing these cases, the court specifically held that *Childs* had improperly extended the pecuniary loss rule, and to this extent, was overruled.[56] Citing *Thompson*, the court held that the determination of damages was a business and

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[42]422 N.E.2d 1236 (Ind. 1981).

[43]*Id.* at 1236, (Hunter, J., dissenting).

[44]*Id.*

[45]361 Mich. 331, 105 N.W.2d 118 (1960).

[46]*Id.* at 334-38, 105 N.W.2d at 120-21.

[47]422 N.E.2d at 1239.

[48]*Id.* (citing Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972) (doctrine of interspousal immunity abolished as based on outmoded legal theories); Troue v. Marker, 253 Ind. 284, 252 N.E.2d 800 (1969) (prohibition of wife's recovery for loss of consortium abrogated on basis of changes in legal and social status of women); Perkins v. State, 252 Ind. 549, 251 N.E.2d 30 (1969) (sovereign immunity abolished in the face of the changing role of government and development of insurance)).

[49]462 N.E.2d 1316 (Ind. Ct. App. 1984), *transfer denied*, Sept. 13, 1984. In this case, the deceased was a seventeen-month-old boy who had been injured when he was struck by an automobile. His father had taken him immediately to the hospital for an examination. He was shortly released with the diagnosis that he was fine. The following morning the child became unconscious and died shortly thereafter from internal bleeding. *Id.* at 1316.

[50]*Id.* at 1317-18.

[51]*See supra* notes 13-22 and accompanying text.

[52]*See supra* notes 23-25 and accompanying text.

[53]*See supra* notes 28-31 and accompanying text.

[54]*See supra* notes 32-41 and accompanying text.

[55]462 N.E.2d at 1317-18.

[56]*Id.* at 1318.

commercial question only.[57] The opinion did not, however, decide whether the extension made in *Hahn v. Moore*[58] was improper, leaving open the question of whether the pecuniary value of acts of kindness and affection could still be considered. Notwithstanding this ambiguity, the court very clearly held that the plaintiffs' nonpecuniary loss of love and affection could not be considered in assessing damages.[59] Furthermore, the court reiterated that trial courts and the Indiana Court of Appeals are obliged to follow the precedent established by the Indiana Supreme Court in *Thompson v. Town of Fort Branch*.[60]

The Indiana Supreme Court denied transfer of this case on September 13, 1984,[61] effectively perpetuating an unsatisfactory rule of law. Because of the clear statement in *Mayberry* that only the Indiana Supreme Court has the power to change this rule,[62] the failure of the supreme court to grant transfer and to modify or abolish the rule is a failure on the part of the court to recognize that the rule is no longer viable. Again, Justice Hunter wrote a dissenting opinion to the decision to deny transfer of the case.[63] By reference to his dissent in *Boland v. Greer*,[64] Justice Hunter reiterated his position that the rule is a "brutal and archaic law,"[65] and that the time has come to compensate parents for the real loss they suffer.[66]

III. Abandonment of the Rule by Other Jurisdictions

A. Solutions to Proposed Problems in the Application of a Nonpecuniary Award

Because the pecuniary loss rule has its roots in early English law,[67] American precedent is also very deeply rooted.[68] Indeed, the very basis

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[57]*Id.* (citing Thompson v. Town of Fort Branch, 204 Ind. 152, 158, 178 N.E. 440, 442 (1931)). The *Thompson* court quoted McGarr v. National & Providence Worsted Mills, 24 R.I. 447, 53 A. 320 (1902), where the court stated, "It is therefore practically a business and commercial question only, and the elements of affection and sentiment have no place therein." *Id.* at 460-61, 53 A. at 325-26.

[58]*See supra* notes 23-25 and accompanying text. While *Hahn* is often considered an original extension of the rule made since the *Thompson* case, the Indiana Supreme Court, in 1891, included "the pecuniary value of all acts of kindness and attention" in their computation of damages in Louisville, N.A. & C. Ry. Co. v. Rush, 127 Ind. 545, 546, 26 N.E. 1010, 1011 (1891).

[59]462 N.E.2d at 1319. The court chastised the lower court's attempt at advancing the state of the law in this area. Rather, it stated that a trial court, as well as an appeals court, is *obliged* to follow a supreme court opinion. *Id.*

[60]*Id.* at 1318 (quoting Boland v. Greer, 409 N.E.2d 1116, 1120 (Ind. Ct. App. 1980), *transfer denied*, July 13, 1981).

[61]467 N.E.2d 1208 (Ind. 1984).

[62]462 N.E.2d at 1319.

[63]467 N.E.2d at 1208 (Hunter, J., dissenting) (denial of transfer).

[64]*See supra* notes 43-48 and accompanying text.

[65]467 N.E.2d at 1209 (Hunter, J., dissenting).

[66]*Id.* at 1210. After this case was remanded to the trial court for a redetermination of damages, the trial judge awarded damages based on the standard in *Hahn v. Moore*, which allowed compensation for the pecuniary value of all acts of kindness and attention. Mayberry v. Miller, No. S582-0681 (Marion County Super. Ct., Nov. 1, 1984).

[67]*See, e.g.*, Blake v. Midland Ry. Co., 18 Q.B. 93, 118 Eng. Rep. 35 (1852).

[68]*See, e.g.*, Morgan v. Southern Pac. Co., 95 Cal. 510, 30 P. 603 (1892); Pierce v.

of recovery for wrongful death is Lord Campbell's Act.[69] However, Lord Campbell's Act does not in itself restrict recovery to pecuniary loss.[70] Rather, shortly after its enactment, it was judicially determined that damages should be limited to those losses pecuniary in nature.[71] Every American jurisdiction has a wrongful death statute, each somehow patterned after Lord Campbell's Act.[72]

Conners, 20 Colo. 178, 37 P. 721 (1894); Southern Ind. Ry. Co. v. Moore, 34 Ind. App. 154, 72 N.E. 479 (1904); Aaron v. Missouri & Kan. Tel. Co., 89 Kan. 186, 131 P. 582 (1913); Graffam v. Saco Grange, 112 Me. 508, 92 A. 649 (1914); Oklahoma Portland Cement Co. v. Dow, 98 Okla. 44, 224 P. 168 (1924).

[69]Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93.

[70]Lord Campbell's Act, in pertinent part, provides:

> § 1 [W]hensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured . . . .

§ 2 [E]very such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action *the Jury may give such Damages as they may think proportioned to the Injury* resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought; and the Amount so recovered, after deducting the Costs not recovered from the Defendant, shall be divided amongst the before-mentioned Parties in such Shares as the Jury by their Verdict shall find and direct. *Id.* (emphasis added).

[71]*See* Blake v. Midland Ry. Co., 18 Q.B. 93, 118 Eng. Rep. 35 (1852).

[72]*See* ALA. CODE §§ 6-5-391, -410 (1975); ALASKA *Stat.* § 9.55.580 (1962); ARIZ. REV. STAT. ANN. § 12-611 (1982); ARK. STAT. ANN. § 27-906 (1979); CAL. CIV. PROC. CODE § 377 (West Supp. 1985); COLO. REV. STAT. § 13-21-201 (1973); CONN. GEN. STAT. ANN. § 52-555 (West Supp. 1984); DEL. CODE ANN. tit. 10, § 3722 (Supp. 1982); FLA. STAT. ANN. § 768.19 (West Supp. 1984); GA. CODE ANN. §§ 51-4-2 to -4 (Supp. 1982); HAWAII REV. STAT. § 663-3 (1976); IDAHO CODE § 5-311 (Supp. 1984); ILL. ANN. STAT. ch. 70, § 1 (Smith-Hurd 1959); IND. CODE § 34-1-1-2 (1982); IOWA CODE ANN. § 633.336 (West Supp. 1983-1984); KAN. CIV. PROC. CODE ANN. § 60-1901 (1967); KY. REV. STAT. ANN. § 411.130 (Bobbs-Merrill Supp. 1984); LA. CIV. CODE ANN. art. 2315 (West Supp. 1985); ME. REV. STAT. ANN. tit. 18-A, §2-804 (1964 & Supp. 1982-1983); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-902, 3-904 (1980 & Supp. 1983); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1985); MICH. COMP. LAWS ANN. § 600.2922 (West Supp. 1984-1985); MINN. STAT. ANN. § 573.02 (West Supp. 1984); MISS. CODE ANN. § 11-7-13 (Supp. 1984); MO. ANN. STAT. § 537.080 (Vernon Supp. 1985); MONT. CODE ANN. §§ 27-1-512 to -513 (1983); NEB. REV. STAT. §§ 30-809 to -810 (1943); NEV. REV. STAT. § 41.085 (1983); N.H. REV. STAT. ANN. § 556.12 (1974); N.J. STAT. ANN. § 2A:31-1 (West 1952); N.M. STAT. ANN. §§ 41-2-1 to -4 (1978); N.Y. EST. POWERS & TRUSTS LAW § 2d § 5-4.1 to -4.6 (McKinney Supp. 1984-1985); N.C. GEN. STAT. § 28A-18-2 (1976); N.D. CENT. CODE § 32-21-01 Supp. (1983); OHIO REV. CODE ANN. §§ 2125.01-.04 (Baldwin 1982); OKLA. STAT. ANN. tit. 12, § 1053 (West Supp. 1984-1985); OR. REV. STAT. § 30.020 (1983); 42 PA. CONS. STAT. ANN. § 8301 (Purdon 1982); R.I. GEN. LAWS — § 10-7-1 (1969); S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 21-5-1 (Supp. 1984); TENN. CODE ANN. § 20-5-113 (1980); TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1985); UTAH CODE ANN. §§ 78-11-6 to -7 (1953); VT. STAT. ANN. tit. 14, §§ 1491-1492 (1974 & Supp. 1982); VA. CODE §§ 8.01-50 (1984); WASH. REV. CODE ANN. § 4.20.010 (1962); W. VA. CODE § 55-7-5 (1981); WIS. STAT. ANN. § 895.03 (West 1983); WYO. STAT. § 1-38-101 (Supp. 1984).

The pecuniary loss rule was initially applied to all wrongful death actions, not just those for the wrongful death of children.[73] Today, however, most jurisdictions allow recovery for nonpecuniary losses, such as loss of consortium, parental guidance, society, affection, love, or protection.[74] Especially with the wrongful death of children, the old pecuniary loss rule has been rapidly replaced by recognition of some of these "relational" damages.[75]

The first decision to recognize these types of damages was *Wycko v. Gnodtke*.[76] The court in *Wycko* noted that the pecuniary loss rule was solely a product of the child labor era,[77] and that the value of a child must be based on the value of a human life and the contribution that a family member has in making the family a functioning social and economic unit.[78] Additionally, the court recognized that adhering to this rule today perpetuates the fiction that a minor child is a breadwinner.[79] Obviously, quite the contrary is true. The Indiana Supreme Court has taken note of and described the changes in attitude towards child labor that have occurred since the early nineteenth century.[80] Indeed, if the pecuniary loss rule were strictly applied, once the expenses for maintenance, support, schooling, and other expenses were offset against the damages, most parents would end up owing the tortfeasor.[81] After the *Wycko* decision[82] many other jurisdictions soon followed suit, either by overruling precedent or by statutory amendment.[83]

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[73]*See supra* note 71.

[74]*See, e.g.*, Van Cleave v. Lynch, 109 Utah 149, 166 P.2d 244 (1946) (society, love, companionship, protection, affection of minor child); Denver Consol. Tramway Co. v. Riley, 14 Colo. App. 132, 59 P. 476 (1889) (society and companionship of spouse).

[75]*See infra* notes 76-129 and accompanying text. Relational damages include loss of society, companionship, love, affection, and acts of kindness and attention.

[76]361 Mich. 331, 105 N.W.2d 118 (1960).

[77]*Id.* at 334-38, 105 N.W.2d at 120-21.

[78]*Id.* at 339, 105 N.W.2d at 122.

[79]*Id.* at 341, 105 N.W.2d at 123.

[80]The Indiana Supreme Court, in Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N.E. 229 (1909), noted that the frightful abuses and distressing consequences of the employment of children in mines and factories led many states to prohibit child labor and the accompanying peril to the child's health, life, and limbs, thus affording the children an opportunity to enjoy their childhood. *Id.* at 435-38, 87 N.E. at 235-36.

[81]*See* Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197 (1971).

[82]Two years after *Wycko* was decided, the Michigan legislature apparently agreed with the court, because it amended Michigan's wrongful death statute to include recovery for the loss of companionship. *See* MICH. COMP. LAWS ANN. § 600.2922 (West Supp. 1984-1985).

[83]*See* ARK. STAT. ANN. § 27-909 (1979); Boies v. Cole, 99 Ariz. 198, 407 P.2d 917 (1965) (en banc); Krouse v. Graham, 19 Cal.3d 59, 137 Cal. Rptr. 863, 562 P.2d 1022 (1977) (en banc); FLA. STAT. ANN. § 768.21 (West Supp. 1984); HAWAII REV. STAT. § 663-3 (1976); Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982); Bullard v. Barnes, 102 Ill.2d 505, 468 N.E.2d 1228 (1984). IOWA CODE ANN. § 633-336 (West Supp. 1983-84); KAN. STAT. ANN. § 60-1904 (1976); LA. CIV. CODE ANN. art. 2315 (West Supp. 1985); ME. REV. STAT. ANN. tit. 18-a, § 2-804 (Supp. 1982); MD. CTS. & JUD. PROC.

In general, the fifty states may be classified into three categories:[84] those states that adhere to a strict application of the pecuniary loss rule, where damages include only loss of expected financial contributions;[85] those states that adhere to a looser application of the pecuniary loss rule, where recovery can be had for the pecuniary value of the lost companionship, society, and affection;[86] and those states that have abrogated the pecuniary loss rule in its entirety.[87] The large majority of jurisdictions fall into the second and third categories. Today, only a handful of jurisdictions continue to disallow recovery for the loss of companionship or society in cases involving the wrongful death of children.[88] The courts that have judicially abandoned the pecuniary loss rule have rarely found it necessary to refute arguments against changing the rule.[89] This is because there are few, if any, viable reasons, other than stare decisis, for retaining the pecuniary loss rule.[90]

The primary obstacle that a court must overcome in dispensing with the pecuniary loss rule is the stare decisis principle. Many courts are unwilling to engage in what they consider a usurpation of legislative power by making a judicial pronouncement that the pecuniary loss rule is no longer viable.[91] The courts, however, fail to realize that they need

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CODE ANN. § 3-904(d) (Supp. 1983); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1985); MICH. COMP. LAWS ANN. § 600.2922 (West Supp. 1984-1985); Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961); Bouroughs v. Oliver, 226 Miss. 609, 85 So.2d 191 (1956); MO. ANN. STAT. § 537.090 (Vernon Supp. 1985); Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 500 P.2d 397 (1972); Selders v. Armentrout, 190 Neb. 275, 207 N.W.2d 686 (1973); Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980); NEV. REV. STAT. § 41.085 (1983); N.C. GEN. STAT. § 28-174 (Supp. 1982); OKLA. STAT. ANN. tit. 12, § 1055 (West Supp. 1984-1985); OR. REV. STAT. § 30.020 (1983); Nance v. State Bd. of Educ., 277 S.C. 64, 282 S.E.2d 848 (1981); Anderson v. Lale, 88 S.D. Ill, 216 N.W.2d 152 (1974); Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983); Jones v. Carvell, 641 P.2d 105 (Utah 1982); VT. STAT. ANN. tit. 14, § 1492(b) (Supp. 1982); VA. CODE § 8.01-52 (1984); WASH. REV. CODE ANN. § 424.010 (Supp. 1985); W. VA. CODE § 55-7-6 (Supp. 1984); WIS. STAT. ANN. § 895.04 (West Supp. 1984-1985); WYO. STAT. § 1-38-102 (Supp. 1984).

[84]*See* Finkelstein, Pickrel & Glasser, *The Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish*, 74 COLUM. L. REV. 884, 886-87 (1974) [hereinafter cited as Finkelstein, Pickrel & Glasser].

[85]*See, e.g.*, Miller v. Mayberry, 462 N.E.2d 1316 (Ind. Ct. App. 1984), *transfer denied*, Sept. 13, 1984; Keaton v. Ribbeck, 58 Ohio St. 2d 443, 391 N.E.2d 307 (1979).

[86]*See, e.g.*, Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980).

[87]*See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 3-904(d) (Supp. 1983). Maryland has one of the most expansive statutes in this area. It provides for recovery for "mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education . . . ." *Id.*; *see also* FLA. STAT. ANN. § 768.21 (West Supp. 1984).

[88]*See supra* note 83. *See also* Sanchez v. Schindler, 651 S.W.2d 249, 252 (Tex. 1983) (where the court stated that thirty-five states allow recovery for loss of companionship and society).

[89]*See* Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).

[90]*See* Boland v. Greer, 422 N.E.2d 1236 (Ind. 1981) (Hunter, J., dissenting) (denial of transfer); Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).

[91]*Id.*

not necessarily don a "legislative cap" in changing this rule. Many jurisdictions still follow a pecuniary loss rule, but allow recovery for the pecuniary value of the lost companionship and affection.[92] This is accomplished by finding that acts of kindness, affection, and companionship have a pecuniary value to the parents and are thus compensable under the statute. Moreover, the pecuniary loss rule was initially created by judicial fiat.[93] Consequently, there should be no bar to a court reevaluating the rule once it has become apparent that the basis for the rule no longer exists.

In addition to the stare decisis argument, it has been argued that sympathetic juries will award excessive and inconsistent verdicts.[94] However, in a statistical study made on the question of amount and consistency of damages, it was found that in states which limited damages to pecuniary losses, the median award was $28,845.[95] Where recovery for items such as loss of society or companionship was specifically allowed, the median award was $44,060.[96] This increase is to be expected because more items of loss are to be considered in the latter.[97] The study also found that there was actually less variation in awards in expanded recovery states than in the pecuniary loss states,[98] thereby refuting the contention that allowing nonpecuniary damages would result in greater inconsistency.

One reason given for greater inconsistency among pecuniary loss cases is that judges very often apply the pecuniary loss rule inconsistently. Sometimes a strict application will be required, and other times the judge will only "wink" at the rule and allow an instruction contradicting it.[99] This intermittent application of the rule results in a wide discrepancy among verdicts.[100]

Inconsistent verdicts are also the result of the basic conflict between the pecuniary loss rule and current notions of fair compensation.[101] One court even noted that juries often attempt to do some kind of justice despite the judges' charge, so they place an unrealistically high value on household chores.[102] The goal of greater uniformity would be promoted by removing the conflict between the law and human impulse.[103]

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[92]*See, e.g.*, Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980).

[93]*See* Blake v. Midland Ry. Co., 18 Q.B. 93, 118 Eng. Rep. 35 (1852). *See supra* note 71 and accompanying text.

[94]*See* Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961) (fear of excessive jury verdicts argued by defendant).

[95]Finkelstein, Pickrel & Glasser, *supra* note 84, at 887.

[96]*Id.*

[97]*Id.*

[98]*Id.* at 892.

[99]*Id.*

[100]*See* Belfance, *The Inadequacy of Pecuniary Loss as a Measure of Damages in Actions for the Wrongful Death of Children*, 6 OHIO N.U.L. REV. 543 (1979).

[101]Finkelstein, Pickrel & Glasser, *supra* note 84, at 891.

[102]Green v. Bittner, 85 N.J. 1, 19, 424 A.2d 210, 219 (1980).

[103]Finkelstein, Pickrel & Glasser, *supra* note 84, at 891. *See, e.g.*, Compania Dominicana de Aviacion v. Knapp, 251 So.2d 18 (Fla. Dist. Ct. App.), *cert. denied*, 256 So. 2d 6 (Fla. 1971) (where $1,800,000.00 was awarded to the parents of a fifteen-year-old boy who was killed when an airplane crashed into the garage of their home).

In order to combat the problem of excessive verdicts, the authors of the statistical study advocate placing a ceiling on the amount recoverable for emotional injury.[104] This permits recovery for the loss of companionship and other relational injuries, while eliminating the threat of runaway verdicts.[105]

Some courts have made the argument that the damages awarded for the wrongful death of children must be limited to pecuniary losses because damages for lost love, affection, and society of the child are only speculative, and that no amount could truly compensate the plaintiffs for their loss.[106] This argument breaks down, however, when one considers that courts are constantly redressing emotional and physical injuries in terms of monetary awards. Loss of spousal consortium, emotional pain and suffering, the loss of a limb, and decreased enjoyment of life are all losses for which one cannot truly be compensated in monetary terms. The Indiana courts in particular have acknowledged that the value of a child's life is " 'incapable of admeasurement by any mathematical or exact rule, and the amount must be fixed by estimate, which bears some semblance to conjecture.' "[107] However, compensation to the parent of a deceased child for a nonpecuniary loss is no more conjectural than compensation for other types of physical or emotional injuries.[108]

B. Two Recent Approaches

Two recent cases in other jurisdictions, *Bullard v. Barnes*[109] and *Sanchez v. Schindler*,[110] have taken different approaches to alleviating the harshness of the pecuniary loss rule. Both approaches are typical of the recent trend.

In *Bullard*, the trial court's instruction allowed the jury to consider the pecuniary value of "the parents' loss of society with the decedent."[111] The appellate court considered this instruction in light of the fact that of the twenty-three jurisdictions which limit recovery to pecuniary losses, fourteen of those jurisdictions allow parental recovery for the loss of society of the child.[112] The appellate court found that the term "pecuniary

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[104]*Id.*

[105]Finkelstein, Pickrel & Glasser, *supra* note 84, at 891.

[106]*See, e.g.*, Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); Kennedy v. Byers, 107 Ohio St. 90, 140 N.E. 630 (1923); Koskela v. Martin, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980).

[107]Thompson v. Town of Fort Branch, 204 Ind. 152, 162, 178 N.E. 440, 444 (1931) (quoting American Motor Car Co. v. Robbins, 181 Ind. 417, 422, 103 N.E. 641, 642 (1914)). 642 (1914)).

[108]*See, e.g.*, Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981).

[109]468 N.E.2d 1228 (Ill. 1984).

[110]651 S.W.2d 249 (Tex. 1983).

[111]468 N.E.2d at 1231. With the *Bullard* decision, Illinois is now one of fifteen jurisdictions which allow parental recovery for loss of society of the child when the statute specifies that the loss must be pecuniary.

[112]*Id.* at 1232.

injuries'' had received an interpretation that was broad enough to encompass the loss of a child's society.[113] The court rejected the argument that the legislature was the proper body to decide the question, finding that previous decisions had extended the meaning of the term pecuniary enough so that it would be anomalous to require the legislature's approval.[114] The fact that spouses and children could recover these non-pecuniary losses was further authority that the court did not need legislative approval.[115]

One caveat to this approach is that the court required a set-off of child rearing expenses in arriving at a verdict.[116] This approach is not novel,[117] but it does illustrate an attempt to assess more accurately the damages suffered by parents.[118]

In *Sanchez v. Schindler*,[119] the court dealt with a Texas wrongful death statute limiting recovery to ''actual damages.''[120] Furthermore, the jury could award such damages as they thought proportionate to the injuries.[121] Prior to *Sanchez*, damages in child death cases had been judicially limited to pecuniary losses.[122]

In holding that parents could now recover for loss of their child's society and companionship, the *Sanchez* court overruled one hundred years of precedent.[123] In its decision, the court noted that a true application of the pecuniary loss rule might well reward the tortfeasor and that the rule had developed during an era when children were economic assets.[124] Additionally, the court previously had held that injuries to the familial relationship were compensable in a suit for loss of spousal consortium.[125] The *Sanchez* court reasoned that the plaintiffs' claim to

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[113]*Id. See also* Elliott v. Willis, 92 Ill. 2d 530, 442 N.E.2d 163 (1982) (where the court held, based on a broad definition of pecuniary injury, that a widowed spouse had the right to recover damages for loss of consortium under the wrongful death act).

[114]468 N.E.2d at 1233.

[115]*Id.* at 1234.

[116]*Id.* at 1234-35.

[117]*See, e.g.*, Fuentes v. Tucker, 31 Cal. 2d 1, 9, 187 P.2d 752, 757 (1947); Haumersen v. Ford Motor Co., 257 N.W.2d 7, 17 (Iowa 1977); Sellnow v. Fahey, 305 Minn. 375, 382-83, 233 N.W.2d 563, 568 (1975). *See also* Comment, *Damages in Wrongful Death and Survival Actions*, 29 OHIO ST. L.J. 420, 447 (1968). *Cf.* Jones v. Hildebrant, 191 Colo. 1, 3 n.1, 550 P.2d 339, 341 n.1 (1976); Sinn v. Burd, 486 Pa. 146, 151-52 n.3, 404 A.2d 672, 675 n.3 (1979) (jurisdictions where child rearing expenses must be deducted from the award, but where no recovery for loss of society may be awarded).

[118]*See* Comment, *Damages in Wrongful Death and Survival Actions*, 29 OHIO ST. L.J. 420, 447 (1968).

[119]651 S.W.2d 249 (Tex. 1983).

[120]TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1985). This statute creates a cause of action for ''actual damages on account of the injuries causing the death. . . .'' *Id.*

[121]*Id.* at art. 4677. This statute provides that ''[t]he jury may give such damages as they may think proportionate to the injury resulting from such death.'' *Id.*

[122]*See, e.g.*, Houston & T. C. Ry. v. Cowser, 57 Tex. 293, 303 (1881).

[123]651 S.W.2d at 251.

[124]*Id.*

[125]*See* Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex. 1978).

damages for the loss of their child's society was closely analogous to a spouse's claim to damages for loss of spousal society; thus, it would be illogical to allow one and preclude the other. The court also pointed out that twenty-one states statutorily recognize recovery for loss of society and companionship[126] and that fourteen more states interpret their statutes requiring pecuniary loss to include loss of society.[127] Additionally, the court noted that the judiciary traditionally had been the "lawmaker" in the area of tort law.[128] Moreover, the *Sanchez* court extended the recovery of parents to include definition of "actual damages" for mental anguish suffered by the parents.[129] The *Sanchez* court was very clear in its position that the pecuniary loss rule should no longer stand as an obstacle to parents who suffer a tremendous loss upon the death of their minor child.

IV. Analogous Tort Situations Where "Relational" Damages Are Awarded

A. Recovery by Children for Loss of Parental Society

The first court to recognize that children have a cause of action for the loss of parental society was the Massachusetts Supreme Court in *Ferriter v. Daniel O'Connell's Sons, Inc.*,[130] decided in 1980. The *Ferriter* court ruled that if emotional dependency upon the parent can be demonstrated, then the child can collect damages for the loss of that parent's society.[131] Interestingly, Massachusetts had already recognized a cause of action to recover nonpecuniary damages for the death of a child. The court therefore drew an analogy between recovery for the death of a parent and recovery for the death of a child, and said that if the parental interest received judicial protection,[132] similar protection should be afforded to children when they suffer the loss of a parent.[133]

Prior to the *Ferriter* case, courts had been reluctant to recognize the rights of children for the loss of a parent. The first right granted to children was the right to shelter, food, clothing, schooling, and moral support and guidance from their father.[134] Because the loss of consortium action in both spousal consortium and children's consortium cases arose

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[126]651 S.W.2d at 252-53. *See supra* note 83.

[127]*Id.* Fifteen jurisdictions now interpret their statutes to allow loss of society after the *Bullard* decision.

[128]651 S.W.2d at 252.

[129]*Id.* at 253.

[130]413 N.E.2d 690 (Mass. 1980).

[131]*Id.* at 696.

[132]In Massachusetts, parents may recover for the loss of their child's society, love, and affection if their child is wrongfully killed. Mass. Gen. Laws Ann. ch. 229, § 1 (West 1985).

[133]413 N.E.2d at 693.

[134]Daily v. Parker, 152 F.2d 174, 177 (7th Cir. 1945).

out of a property right, it was commonly thought that children did not have a right to parental consortium because children did not have a property right in their parents.[135] In recent years, however, most states have generally recognized greater protection of children's rights.[136] While actual judicial protection was not afforded to children until 1980 in *Ferriter*, many courts and other authorities have expressed the desire to compensate children for the very real loss suffered when a parent dies. For example, in *Hill v. Sibley Memorial Hospital*,[137] the court recognized that "natural justice" supported recognition of this cause of action.[138] Additionally, one authority has stated that while items such as the loss of training, nurture, education, and guidance "are *not, perhaps, strictly pecuniary*, their allowance seems fully justified even under a functional view of damages, since this is the kind of loss for which money can supply some sort of a practical substitute."[139]

Following *Ferriter*, the Michigan Supreme Court in *Berger v. Weber*[140] said that to deny the nonpecuniary loss of parental consortium on the ground of intangibility would create unreasonable disparities in the way the law treats damage recovery in general.[141] Tort law is a means of providing compensation for many intangible injuries, including pain and suffering.[142] Consequently, the loss of society, love, and affection that a parent suffers upon the death of a child is no more inappropriate for tort law to redress than any other intangible injury.

Recognition of the loss of parental consortium as a cause of action follows the trend of greater protection of family interests and is directly related to the collateral issue of recognizing a recovery by the parents for the same types of losses. Generally, the same arguments that have been made in opposition to recognition of a compensable loss of parental society have also been made in opposition to the recognition of a compensable loss of children's society.[143] In *Koskela v. Martin*,[144] the court considered seven of the most common arguments against recognizing the loss of parental consortium and decided that they precluded recovery. These arguments are: determination of whether a child can maintain such an action should be left to the legislature;[145] sound precedent is

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[135]3 W. BLACKSTONE, COMMENTARIES *142.

[136]*See, e.g.*, IND. CODE § 31-6-1-1 (1982) (which expresses the broad purposes behind the Indiana Juvenile Code); IND. CODE § 31-6-4-3 (Supp. 1984) (which protects children from their parents' neglect or abuse).

[137]108 F.Supp. 739 (D.D.C. 1952).

[138]*Id.* at 741. *See also* Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962).

[139]F. HARPER & F. JAMES, TORTS § 25.14, at 1331 (1956) (emphasis in original).

[140]411 Mich. 1, 303 N.W.2d 424 (1981).

[141]*Id.* at 16, 303 N.W.2d at 435.

[142]*See supra* notes 106-08 and accompanying text.

[143]*See* Koskela v. Martin, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980); Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981).

[144]91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980).

[145]*Id.* at 571, 414 N.E.2d at 1151.

lacking;[146] intangible nature of the loss makes pecuniary valuation difficult;[147] double recovery is a possibility;[148] recognition of this cause of action could result in increased litigation and multiple claims;[149] defendants' liability would be greatly expanded;[150] and damages based on the loss of consortium historically relate to impairment of the sexual life of a married couple and thus are not an element of damages in a child's claim.[151]

In *Weitl v. Moes*,[152] the Iowa Supreme Court did not find that these arguments precluded recovery of parental consortium. The decision was based on the premise that most of these arguments carried no greater weight in relation to a child's claim than they would in a parental or spousal claim.[153] The court noted that loss of consortium is a creation of the common law, not of the legislature, and thus is within the court's sphere of authority.[154] Also, the court recognized that while it may be possible to distinguish a spousal consortium claim from a child's claim of loss of consortium,[155] it is nevertheless difficult to find any legal distinction between a child's claim for loss of parental consortium and a parent's claim for loss of a child's consortium.[156] Indeed, the court even stated that if the applicable statute prohibits the bringing of this action by the children,[157] it must necessarily prohibit the bringing of the action on behalf of a spouse.[158] This same point may be made collaterally — that if it prohibits a *parent's* action, it must also prohibit a spouse's action, which is clearly not the case.

There are some issues in recognizing parental consortium as a compensable loss that are not applicable in the cases dealing with loss of children's society.[159] For the most part, however, courts that have allowed damages to children for the nonpecuniary loss of parental society have encountered the same arguments which were presented when courts began

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[146]*Id.*

[147]*Id.*

[148]*Id.*

[149]*Id.* at 572, 414 N.E.2d at 1151.

[150]*Id.*, 414 N.E.2d at 1151.

[151]*Id. See also* Comment, *A Minor Child's Claim for Lost Parental Society and Companionship in Illinois: Another Look*, 17 J. MAR. 113, 128-36 (1984) (a more thorough discussion of each of the listed issues).

[152]311 N.W.2d 259 (Iowa 1981).

[153]*Id.* at 266.

[154]*Id.*

[155]*Id.* at 265 (citing Borer v. American Airlines, Inc., 19 Cal. 3d 441, 448, 563 P.2d 858, 863, 138 Cal. Rptr. 302, 307 (1977).

[156]311 N.W.2d at 265 (citing Borer v. American Airlines, Inc., 19 Cal. 3d 441, 444, 563 P.2d 858, 860, 138 Cal. Rptr. 302, 307 (1977).

[157]*See* IOWA CODE ANN. § 613.15 (West Supp. 1984).

[158]311 N.W.2d at 263.

[159]For example, concerns over multiple litigation, joinder of parties, and the fact that children have no property interest in their parents are generally not applicable in cases where parents are attempting to recover for the lost affection, kindness, and society of their children who have been wrongfully killed.

recognizing the nonpecuniary loss of a child's society to his parent. Most courts have been unpersuaded by these arguments against the recognition of nonpecuniary losses.[160]

B. Recovery by Spouses for Loss of Spousal Consortium

Recovery for the loss of spousal consortium is one of the oldest manifestations of the recognition of nonpecuniary loss that can be suffered by a person.[161] Recovery was first awarded only to husbands, but more recently wives have also recovered for loss of spousal consortium.[162] The husband's loss of the pecuniary value of his wife's services, which could be quantified, and the value of her company and affection, which was much more intangible, became known as loss of consortium.[163] While there is some basis for asserting that the loss of spousal consortium is a property right, the more reasoned conclusion is that the compensation is based upon the spouse's interest in the marital relationship.[164] Although recovery in loss of spousal consortium actions was initially limited to pecuniary losses, most courts have extended that to include loss of love, companionship, and affection.[165] Nearly every state recognizes the right of a spouse to recover damages for the injury to the marital relationship occasioned by the negligence of another.[166] For example, in *Hitaffer v. Argonne Co.*,[167] the court adopted a statement by Prosser that the "loss of 'services' is an outworn fiction."[168] This statement is similar to that of the many courts that have echoed the same thought in dispensing with the pecuniary loss rule in child death cases.

Today, it is not necessary to prove a pecuniary loss of services in actions for loss of spousal consortium, because services are no longer the basis of the action, but are merely one element of the damages.[169]

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[160]*See, e.g.*, Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980); Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981).

[161]For a general discussion of loss of spousal consortium as a compensable injury, see H. CLARK, THE LAW OF DOMESTIC RELATIONS § 10.1 (1968).

[162]*See* Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950) (where the court finally also gave the wife a right to recover for the loss of her husband's consortium when he was negligently injured or killed.

[163]For a general overview of this area, see Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Comment, *Negligent Injury to Family Relationships: A Reevaluation of the Logic of Liability*, 77 NW. U.L. REV. 794 (1983).

[164]*See* Comment, *Negligent Injury to Family Relationships: A Reevaluation of the Logic of Liability*, 77 Nw. U. L. REV., 794, 798 (1983).

[165]*See, e.g.*, Selleck v. City of Janesville, 104 Wis. 570, 576-79, 80 N.W. 944, 946-47 (1899) (husband's recovery not limited to the fair market value of wife's companionship and counsel); Denver Consol. Tramway Co. v. Riley, 14 Colo. App. 132, 140, 59 P. 476, 478-79 (1899) (husband entitled to recover for the loss of wife's society and companionship).

[166]Louisiana does not allow either spouse to recover for loss of consortium. *See* Johnston v. Fidelity Nat'l Bank of Baton Rouge, 152 So.2d 327 (La. Ct. App. 1963).

[167]183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950).

[168]*Id.* at 818 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 948 (1941)).

[169]*See* Adams v. Main, 3 Ind. App. 232, 234-35, 29 N.E. 792, 793 (1892).

This is precisely the point that has been raised by many courts in dispensing with the pecuniary loss rule as it relates to recovery by parents for the loss of their child's society.[170] Because the pecuniary value of the child's services is no longer the basis for their award in any practical sense, recovery should be had for the *true* losses: the loss of the child's society, companionship, and love.

Some courts have accepted the analogy between spousal consortium actions and actions for the recovery of the loss of a child's society, while others have not.[171] In *Keaton v. Ribbeck*,[172] the court declared the analogy to be inaccurate, and summarily dispensed with it without further discussion.[173] Other courts (the *Boland v. Greer*[174] court, for example) have held that the marriage relationship is significantly different from the relationship between parents and children, primarily because of the element of damages which compensates for the loss of a sexual relationship between husband and wife.[175] This argument, however, ignores the fact that compensation in suits for recovery of the loss of *parental* society includes such items as loss of training, guidance, nurture, education, protection, and advice. These items comprise the bulk of the recovery by children for the loss of their parents' society, yet are not part of the loss of society for which parents claim compensation. Even so, most jurisdictions that recognize a cause of action for nonpecuniary losses of children feel that they must also, then, recognize the nonpecuniary losses claimed by parents.[176] Indeed, more than one jurisdiction has noted that there is no basis for distinguishing between claims made by parents and those made by children.[177] If such were the case, it would logically follow that there is no substantive distinction between the recognition of spousal consortium and the loss of society claimed by parents or children.

C. *Recover by Parents for Loss of Society of Their Unborn Fetus*

The recognition that parents of an unborn child may bring an action under their state's wrongful death statute is relatively new.[178] A split of

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[170]*See, e.g.*, Boland v. Greer, 422 N.E.2d 1236 (Ind. 1981) (Hunter, J., dissenting) (denial of transfer); Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960); Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983).

[171]*Compare* Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) *with* Boland v. Greer, 409 N.E.2d 1116 (Ind. Ct. App. 1980), *transfer denied*, July 13, 1981, *and* Keaton v. Ribbeck, 391 N.E.2d 307 (Ohio 1979).

[172]391 N.E.2d 307 (1979).

[173]*Id.* at 308-09.

[174]409 N.E.2d 1116 (Ind. Ct. App. 1980), *transfer denied*, July 13, 1981.

[175]*Id.* at 1120.

[176]*See, e.g.*, Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983).

[177]*See* Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Reptr. 302 (1977); Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980).

[178]The first court to find a cause of action on behalf of a fetus was Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

authority exists as to whether unborn children are or should be covered under a state's wrongful death statute.[179] Of those states that do recognize a cause of action on behalf of the unborn fetus, the measure of damages varies tremendously based on the wording of the statute, and, more specifically, based upon the use of the pecuniary loss rule.

In *Dunn v. Rose Way, Inc.*,[180] a father brought an action for the death of his unborn child, his wife, and his two-year-old daughter.[181] He claimed damages for the deprivation of the unborn child's companionship, society and services.[182] The Iowa Supreme Court decided that a cause of action did exist for the death of the fetus under the Iowa Rules of Civil Procedure,[183] and that the damages were to be for the father's deprivation of anticipated services, companionship, and society of the minor child.[184] The court thus awarded the full amount of damages that the father would have been entitled to had the child been born, thus recognizing the loss suffered by parents when they lose a child *in utero*.

Not all courts have been so liberal in the assessment of damages, however. In *Pehrson v. Kistner*,[185] the Minnesota Supreme Court ruled that the plaintiffs could only recover the full amount of their pecuniary loss resulting from the wrongful death of their unborn child,[186] though the court noted that trying to compensate for the death of a child might be an arbitrary attempt at a difficult, if not impossible, task.[187]

In *Britt v. Sears*,[188] the Indiana Court of Appeals determined that a cause of action for the wrongful death of a fetus did exist. The court did not hesitate to change the law, even in the absence of a legislative mandate. The court reasoned that the legislature adopted the wrongful death statute at a time when medicine did not foresee the ability to administer to fetuses. Consequently, the court was only engaging in what the legislature would have done, had it foreseen the advances in medical science.[189]

Similarly, the pecuniary loss rule developed at a time when economic loss to the parents was a genuine loss. The legislature did not foresee

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[179]Twenty-six jurisdictions have expressly allowed it, and sixteen continue to disallow it. Annot., 15 A.L.R.3D 992 (1967 & Supp. 1984).

[180]333 N.W.2d 830 (Iowa 1983).

[181]*Id.* at 831.

[182]*Id.*

[183]*Id.* at 832-34. Parents may sue for loss of services, companionship, and society resulting from the death of their minor child. IOWA R. CIV. P. 8.

[184]333 N.W.2d at 833.

[185]222 N.W.2d 334 (Minn. 1974).

[186]*Id.* at 336.

[187]*Id.* at 337. *See also* O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971). *But see* Panagopoulous v. Martin, 295 F.Supp. 220 (D.C. W.Va. 1969) (where the court held that in the absence of proof of loss of economic benefits, parents could still recover for sorrow, distress, and bereavement).

[188]150 Ind. App. 487, 277 N.E.2d 20 (1971), *transfer denied*, Sept. 19, 1972.

[189]*Id.* at 494, 277 N.E.2d at 24-25.

a time when substantial pecuniary losses would be unheard of as in today's society. Consequently, the Indiana Supreme Court should not be hesitant to change a law which no longer has any application in modern society.

V. Conclusion

The pecuniary loss rule developed at a time when it was responsive to the needs of society. Life has changed, however, and the law must be malleable and flexible enough to change with it; otherwise, our legal system will not be able to meet the needs of society.

In *Britt v. Sears*, the Indiana Court of Appeals was faced with the decision of whether to adopt the majority position in favor of recognizing a cause of action for the wrongful death of a fetus. The court stated that the decisions of the majority were impressive, but not decisive.[190] The court must evidently still adhere to this statement, because it continues to align itself with a shrinking minority even in light of dissatisfaction with the rule by legal commentators, other members of the legal profession, and members of the court itself. The use of a standard which is so inequitable in its application necessitates that the Indiana Supreme Court review and discard the obsolete pecuniary loss rule.

Lori A. Torres

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[190]Britt v. Sears, 150 Ind. App. 487, 490, 277 N.E.2d 20, 22 (1971), *transfer denied*, Sept. 19, 1972.

Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?

I. Introduction

Amendments to the Federal Rules of Civil Procedure were transmitted to Congress by the Chief Justice of the Supreme Court on April 28, 1983, and became effective on August 1, 1983.[1] Four of the amended rules — 7, 11, 16, and 23 — have been the brunt of sharp criticism and dire predictions of adverse consequences.[2] This Note will examine the changes to rule 11[3] and the results of its application in cases decided since the amendment.[4]

The amendments to rule 11 were prompted by the desire to increase judicial efficiency and discourage "dilatory or abusive tactics" by attorneys.[5] Yet the opportunity to receive damage awards for attorney's fees through the operation of rule 11 sanctions has given rise to litigation.[6] Amended rule 11 represents a serious challenge to the attorney-client relationship, and its deleterious effects may outweigh the presumed benefits of judicial economy.[7]

In 1938, the Federal Rules of Civil Procedure provided for a clear and simple statement of a claim for relief and for maximum exchange

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[1]Amendments to Rules, 97 F.R.D. 165 (1983). Rules 6(b), 7(b), 11, 16, 26(a) and (b), 52(a), 53(a), (b), and (c), and 67 were amended. Rules 26(g), 53(f), and 72 to 76 were added, as well as Forms 33 and 34.

[2]*See, e.g., Comments of the Committee on the Fed. Rules of the Am. College of Trial Lawyers Regarding the Prelim. Draft of the Proposed Amends. to the Fed. R. Civ. P.* (1981); Kuzins, *Bar Groups Attack*, 97 L.A. Daily L. J. 1 (1984); Long, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions about Power*, 11 Hofstra L. Rev. 997 (1983); Learner and Schwartz, *Rule 11 Shouldn't Be Changed*, 5 Nat'l L.J. 13 (1983).

[3]The text of Rules 7(b), 11, and 26(g) as amended are included in the Appendix to this paper.

[4]The 1983 amendments were effective August 1, 1983. They apply to any action or proceeding initiated after that date and to pending litigation insofar as just and practicable. Amendments to Rules, 97 F.R.D. 165 (1983).

[5]*Advisory Committee on Fed. R. Civ. P. Note Submitted to the Standing Committee on Rules of Prac. and Proc. of the U.S. Judicial Conf.* The text of this document is included at 97 F.R.D. 165, 198 [hereinafter referred to as *Advisory Comm. Note*].

[6]Additional motions and hearings on the motions are necessary before sanctions under rule 11 are granted. The opportunity to recover attorney's fees will only encourage rule 11 motions. *See infra* note 150 and accompanying text.

[7]Harvey, *The Judicial Assault on the Attorney-Client Relationship: Thoughts on the 1983 Amendments to the Federal Rules of Civil Procedure*, 1 Benchmarks 17, 21 (1984).

of information between the parties before trial.[8] The essence of pleading and discovery under the 1938 rules was to promote resolution of lawsuits on the basis of the merits of genuine issues of law and fact.[9] On the whole, the Federal Rules of Civil Procedure have facilitated rather than thwarted such resolution.[10]

The 1983 amendments to rules for pleading challenge the concept of a plain and simple claim for relief.[11] In substituting a test of "reasonable inquiry" for the former test of an attorney's "good faith" as the standard by which claims are judged, these amendments strike at the core of the attorney-client relationship and the orderly progression of an action from claim to pretrial discovery to resolution on the merits.

This Note will review briefly the history of rule 11 and the nature of the recent changes. By examining cases decided under amended rule 11, it will focus on the meaning of "reasonable inquiry" and how this test differs from the prior test of good faith. The effect on the attorney-client relationship will be considered in light of recent decisions awarding attorney's fees and imposing other sanctions under rule 11.

II. The Development of Rule 11

A. Early Development

Early forms of pleading required attorney certification of the form but not the substance of a pleading.[12] Attorney certification of pleadings had its origin at common law in the institutionalization of the attorney's (solicitor's) role in drafting written pleadings for use by a party or his or her counselor (barrister).[13] In signing the pleading, the attorney-at-law certified compliance with the required forms of pleading but did not attest to the honesty or sufficiency of what was being asserted.[14]

Rule 24 of the Equity Rules of 1842 required the attorney's signature on every bill or pleading as "an affirmation" that there was "good ground" to support it.[15] The formulation "good ground" appears to derive from Supreme Court Justice Story's treatment of the signature requirement in his treatise on equity practice.[16] Contrary to the historical sources he cited, Story saw the function of the attorney's signature as extending beyond certification of the form to certification of the substance

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[8]5 C. Wright and A. Miller, Federal Practice and Procedure, §§ 1332-1334 (1969 & Supp. 1984).

[9]*Id.*

[10]*Id.*

[11]Fed. R. Civ. P. 3; Conley v. Gibson, 355 U.S. 41 (1957).

[12]Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1, 9-13 (1976).

[13]*Id.*

[14]*Id.*

[15]42 U.S. (1 How.) xlviii (1842).

[16]J. Story, Equity Pleadings, ch. 2, § 47 at 48 (10th ed., 1892).

of the pleading.[17] This view was accepted by England's Supreme Court of Judicature in *Great Australian Gold Mining Co. v. Martin*.[18] The Advisory Committee on Rules for Civil Procedure in 1936 referred to Equity Rule 24 and *Great Australian Gold Mining* in its note to rule 11,[19] thus adopting the view that an attorney's signature on a pleading was a certification there was good ground for the action.

B. Rule 11 in 1938

Rule 11 replaced the code pleading practice of using affidavits by a party as the means of certifying pleadings.[20] Thus the burden of assuring honesty in pleadings was placed squarely on the attorney under rule 11, but rested on the attorney's *good faith*. Early cases construing rule 11 referred to the attorney's signature as a means of assuring "accountability" in pleadings[21] and as an "affidavit of merit" for the pleadings.[22]

Rule 11 as first promulgated in 1938[23] contained two elements: attorney certification and provision for striking "sham" pleadings. Sanctions could be imposed on an attorney only for "willful" violations of the rule.[24] Rule 11 as originally promulgated was the basis of relatively little litigation. Where the signature requirement of the original rule 11 was not met, courts treated the deficiency as a technical error which they had implicit powers to correct.[25] In some cases, original rule 11 challenges to a pleading involved parties acting *pro se* or attorneys who assisted a party but were not the "attorney of record."[26] Failure to sign a pleading properly was rarely the basis for striking a pleading.[27]

Issues of false or sham pleadings were raised infrequently.[28] An often-cited case, *Freeman v. Kirby*,[29] resulted in striking of pleadings as

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[17]*Id.* at 49.

[18]1 Ch.D. 1, 10 (1877) (dictum).

[19]1 F.R.D. lxxxii (1938).

[20]*Id. See also* Risinger, *supra* note 12, at 7 and text of Rule 11 in Appendix.

[21]Foster Wheeler Corp. v. Am. Sur. Corp., 25 F. Supp. 225 (E.D.N.Y. 1938).

[22]Russo v. Sofia Bros., 2 F.R.D. 80, 82 (E.D.N.Y. 1941).

[23]Rule 11 remained unchanged from 1938 until its amendment in 1983.

[24]*See* 5 C. WRIGHT AND A. MILLER, *supra* note 8.

[25]*Id.*

[26]*See* Covington v. Cole, 528 F.2d 1365 (5th Cir. 1976); Ellis v. Maine, 448 F.2d 1325 (1st Cir. 1971); Huffman v. Neb. Bureau Vital Statistics, 320 F. Supp. 154 (D. Neb. 1970).

[27]Risinger, *supra* note 12, at 15, reported failure to sign was never used as the basis to strike a pleading. *But see* U.S. *ex. rel.* Sacks v. Philadelphia Health Management Corp., 519 F. Supp. 818 (E.D. Pa. 1981), where a pleading was struck for failure to sign.

[28]Risinger, *supra*, note 12, at 25, stated that only twenty-three cases involved an attempt to strike a pleading as "sham" under rule 11 from 1938 to 1976. The first genuine rule 11 dispute involving sham pleadings did not occur until 1950 in United States v. Long, 10 F.R.D. 443 (D. Neb.). Since 1970, the number of references to rule 11 has increased, although given the increase in all kinds of civil litigation, it is not known whether the percentage of cases that are considered frivolous and unfounded under rule 11 has increased. *See also* Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003 (1977).

[29]27 F.R.D. 395 (S.D.N.Y. 1961).

sham or false because of an attorney's willful violation of rule 11. The *Freeman* case is illustrative of the difficulties courts had with rule 11 as originally promulgated.

The dispute in *Freeman* and its companion suit, *Murchison v. Kirby*,[30] stemmed from an earlier stockholder dispute involving Allegheny Corporation. In 1954 and 1955 several stockholder actions against the officers and directors of Allegheny Corporation were settled out of court. The *Murchison* suit challenging the validity of those settlement agreements was filed first. Murchison's attorney then contacted Freeman and proceeded to bring a second suit challenging the 1954-1955 settlements. Murchison had agreed to pay Holland for both suits, and materials prepared for the *Murchison* litigation were filed in both the *Murchison* and *Freeman* suits. Freeman knew little about the case against Allegheny, and in fact had never met attorney Holland before the suit in Freeman's name was filed.[31] The *Freeman* decision resulted in dismissal when the plaintiff's complaint was struck by the court as sham without a prior finding that the complaint was in fact false.

Although this was the first time a federal court dismissed a suit based on rule 11 without first adjudicating the issue on the merits, the *Freeman* court gave little insight into how "good ground" for a pleading was to be tested. A similar rule 11 challenge in *Murchison v. Kirby* resulted in no finding of violation. In the *Murchison* suit, extensive pretrial discovery and affidavits of the attorneys involved provided ample basis for rejecting the defendants' rule 11 motion to strike the pleadings and a rule 56 motion for summary judgment.[32] The *Freeman* decision has been criticized not because the decision to halt the litigation was wrong, but because there were other more appropriate grounds for dismissal. The court had grounds on which to dismiss the *Freeman* suit or consolidate it with the *Murchison* suit because Freeman's participation as plaintiff had been solicited by Murchison and Murchison, not Freeman, was the real party in interest. Based on the extensive use of pleadings and motions prepared for the *Murchison* case in the *Freeman* case, the court raised the question of attorney honesty in certifying the *Freeman* pleadings without reaching the question of the legal sufficiency of the pleadings as it had done in *Murchison v. Kirby*.[33] By citing only rule 11 as the grounds for dismissal, the court distorted the meaning of rule 11.[34]

Although there have been more cases involving the 1938 version of rule 11 in the past ten years, rule 11 issues involving questions of bad

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[30]27 F.R.D. 14 (S.D.N.Y. 1961).

[31]Freeman v. Kirby, 27 F.R.D. 395, 398 (S.DN.Y. 1961).

[32]Murchison v. Kirby, 27 F.R.D. 14, 18-19 (S.D.N.Y. 1961).

[33]*Freeman*, 27 F.R.D. at 396.

[34]Risinger, *supra* note 12, at 41.

faith pleading still arise infrequently.[35] The infrequent use of a rule 11 motion to strike was and still is due in large part to the availability of other procedural devices.[36] Pretrial conferences under rule 16 provide an opportunity for clarification and stipulation of issues and facts.[37] Rule 36 requests for admissions and other forms of pretrial discovery can eliminate any doubt as to whether there was sufficient factual basis for a pleading or whether the attorney acted in bad faith.[38] Both a rule 12(e) motion for a more definite statement[39] and a rule 56 motion for summary judgment are available to resolve the matter when the sufficiency of factual material behind a pleading is questioned.[40]

Because courts have been reluctant to strike a pleading without holding that the basis for the pleading is false, rule 56 motions for summary judgment have often preempted what otherwise might have been a rule 11 question.[41] Once a party's motion for summary judgment has been granted, courts have often concluded that a rule 11 motion challenging the good faith of the other party is moot.[42]

Questions of attorney conduct, separate from the truth or falsity of the ultimate facts behind the pleading, have also been raised with a rule 11 motion.[43] The original rule 11 did not specify what affirmative duty the attorney had to investigate the client's statement before filing. Courts have been loathe to impose sanctions on attorneys for ethical violations, and original rule 11 cases were no exception.[44] Even where the factual basis for the pleading was shown to be false, no rule 11 sanctions were imposed unless there was some other indication of bad faith by the attorney.[45]

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[35]5 C. WRIGHT AND A. MILLER, *supra* note 8. A review of all reported federal cases since 1970 involving a rule 11 issue revealed that from 1970 to 1978 fewer than twenty rule 11 cases were raised in any year; whereas from 1979 to 1982, each year thirty to forty cases involved rule 11 issues. In 1983, nearly eighty federally reported cases raised rule 11 issues. At this writing, in 1985, there have been over 170 cases involving rule 11 issues reported.

[36]*Id.*

[37]6 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1525 (1969 and 1984 Supp.).

[38]*Id.* at § 2264.

[39]*Id.* at §§ 1376-1377.

[40]*Id.* at § 2712.

[41]*See* M. GREEN, BASIC CIVIL PROCEDURE (1982) at 129, 136-37, and the cases cited therein, noting pleadings are poor screening devices, a rule 56 motion for summary judgment being better suited.

[42]Bates v. Clark, 95 U.S. 204 (1877); 5 C. WRIGHT AND A. MILLER, *supra* note 8, § 1334. Thoma v. A.H. Robbins Co., 100 F.R.D. 344 (D.N.J. 1983) is a recent example where even a flagrant abuse of pleading and motion practice resulted in no rule 11 sanctions once the court denied the unfounded motions.

[43]Gulf Oil Corp. v. Bill's Farm Center, Inc., 52 F.R.D. 114 (W.D. Mo. 1970).

[44]C. WRIGHT AND A. MILLER, *supra* note 8, §§ 1334-1334.

[45]*See* Roadway Express Inc. v. Piper, 447 U.S. 752, 766 (1980); Nat'l Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976); Browning Debentures Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977) (all cited in the *Advisory Comm. Note* to rule 11). *Roadway* held that bad faith may be found in the

C. *The 1983 Amendments to Rule 11*

The changes to rule 11[46] fall into four categories: (1) extension of the signature requirements to motions and other papers and to parties acting *pro se*; (2) substitution of the "reasonable inquiry" test for the "good ground" test; (3) mandatory imposition of sanctions for violations; and (4) elimination of the provision for striking a pleading as a sham or falsity, but specific inclusion of a provision for awarding attorney's fees as a sanction for violations. These changes are the product of several important trends, but they are not the product of developments in case law under rule 11 as originally promulgated.

The remainder of this Note will focus on the "reasonable inquiry" test and the effect of the new rule 11 on the attorney-client relationship. Although the effect of extending the application of rule 11 to parties acting *pro se* may pose some initial difficulties for those parties, the courts will continue to look more leniently at the party *pro se* and correct simple technical defects.[47] Extension of rule 11 to all motions and other papers (and the concomitant requirement for discovery motions in rule 26(g)) will impose some additional risk and burden on attorneys and their clients. The discussion below highlights some of these difficulties. Elimination of the provision for striking sham or false pleadings was a step which recognized that other procedural devices (rules 12(f) and 56) are better suited to the task and that rule 11 had, in fact, rarely been used as a motion to strike.

III. Reasonable Inquiry Into Fact and Law

A. *Foundation of the "Reasonable Inquiry" Test*

The Advisory Committee notes to rule 11 assert that the "good ground" test in the original rule "[has] been replaced by a standard

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basis for bringing the action or in the way the litigation was conducted, and where there is evidence of bad faith, sanctions may include the award of attorney's fees. *See also* Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 251-53 (1975) and 28 U.S.C. § 1927 (1983), on the matter of exceptions to the American rule on attorney's fees based on the bad faith of a litigant. *See generally* Driscoll v. Oppenheimer and Co., Inc., 500 F. Supp. 174 (N.D. Ill. 1980), regarding the relationship between meritlessness and bad faith. *See contra* McCandless v. Great Atlantic and Pacific Tea Co., 697 F.2d 198 (7th Cir. 1983), where the court noted in dictum that all courts do not uniformly subscribe to the same standards of bad faith.

[46]*See* the text of rules 7(b), 11, and 26(g) in the Appendix to this Note. These rules should be read together. Note the subtle wording changes among these three rules.

[47]*See supra* notes 16-19 and accompanying text; Haines v. Kerner, 404 U.S. 519, 520 (1972), *cited in Advisory Comm. Note* to rule 11. A case involving a *pro se* action under amended rule 11 is Theim v. Hertz Corp., 732 F.2d 1559 (11th Cir. 1984). *But cf.* Hernandez-Avail v. Averill, 725 F.2d 25 (2d Cir. 1984) (failure to sign a pleading may still result in a decision that the individual who did not sign cannot be considered a party to the action and therefore is ineligible to appeal and share damages). *See also* Rodgers v. Lincoln Towing Services, Inc., 596 F. Supp. 13 (N.D. Ill. 1984), where an attorney who appeared in a proceeding but did not sign the pleadings was exempted from rule 11 sanctions.

that is much more focused. . . . This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation."[48] The Advisory Committee Note cites two cases decided under the original rule 11 in this context: *Kinee v. Abraham Lincoln Federal Savings and Loan Ass'n*[49] and *Nemeroff v. Abelson*.[50]

In *Kinee*, a class action was brought by several mortgagors alleging that failure to pay interest on that portion of their monthly mortgage payments held in escrow for insurance and property taxes by defendant mortgagees was an actionable wrong. The plaintiffs claimed this practice was a precondition for obtaining a mortgage and therefore constituted a violation of antitrust laws.[51] Defendants sought to have the case dismissed on, among other grounds, a rule 11 violation because the plaintiffs had joined as defendants every individual or lending institution listed in the Philadelphia telephone directory under various headings relating to mortgage brokers. The court found this to be "grossly improper" but held that dismissal was an inappropriate sanction. Forty-six of the 131 party-defendants were dismissed, and the plaintiffs' attorneys were held responsible for the expenses incurred by those defendants in connection with the suit.[52]

The *Nemeroff* case, also a class action, involved insider stock trading. After dismissing the action, the district court found that the action had been commenced in bad faith against the publishers of certain financial columns and awarded attorneys' fees and costs to them. However, the court also found the action against other investors involved in short stock sales as a result of information in those financial publications was not commenced in bad faith and awarded no attorneys' fees to them.[53] The circuit court reversed the finding that Nemeroff commenced his action against the publishers in bad faith, noting that the question under rule 11 is "whether a reasonable attorney could have concluded that facts supporting the claim *might be established*, not whether such facts *actually had been established*."[54]

Both *Kinee* and *Nemeroff* involved the question of how much pre-filing inquiry into the facts and law is necessary and sufficient to justify the filing of a complaint. The plaintiffs' attorneys in *Kinee* did little or no investigation into who was a proper party-defendant. The court properly applied rule 11 to reach an equitable solution. The attorneys responsible for the improper act were required to pay the costs and fees of those prejudiced by their act. The suit was not dismissed because

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[48] *Advisory Comm. Note*, *supra* note 5.

[49] 365 F. Supp. 975 (E.D. Pa. 1973).

[50] 620 F.2d 339 (2d Cir. 1980).

[51] 365 F. Supp. at 977.

[52] *Id.* at 977 n.1.

[53] 620 F.2d at 350. The investor defendants were awarded costs as the prevailing parties under rule 54(d).

[54] *Id.* at 348.

this would have punished the plaintiffs rather than their attorneys. By allowing the case to go forward for a decision on the merits, the remaining defendants were not unjustly benefited by a procedural dismissal.

The decision in *Nemeroff* resulted in no sanctions on the plaintiff's attorney because no violation was found. The Advisory Committee Note implies a different result might be reached under new rule 11.[55] If the standard is "reasonableness under the circumstances," as the Committee Note states,[56] it seems both the *Kinee* and *Nemeroff* courts would reach the same conclusions now as they did under rule 11 before the amendment. The *Kinee* plaintiffs' attorneys did not investigate and were sanctioned. The *Nemeroff* plaintiff's attorney investigated the complaint for three months prior to filing. He contacted the New York Stock Exchange, confirmed that a Securities and Exchange Commission investigation into the matter was pending, discussed the matter with the attorney of another stockholder considering filing a similar complaint, discussed the matter with a stockbroker who had expressed concern about the defendants' activities in question, and reviewed other published material, all of which led him to conclude there was a sufficient factual basis to substantiate his client's complaint.

The Advisory Committee for the 1983 amendments listed four factors that affect what constitutes a reasonable inquiry at the time the action is commenced: the amount of time available for investigation, whether a client must be relied on as the source of information, whether the interpretation of the law is plausible, and whether forwarding counsel or another attorney was relied on by the attorney filing the pleading.[57] None would nor should have caused the plaintiff's attorney in *Nemeroff* not to file the complaint.

In fact, another result was reached in *Nemeroff* on remand. In 1980, the Second Circuit Court of Appeals remanded the case on the question of bad faith. In 1982, the district court[58] held that an award of attorney's fees was in order for both the publisher defendants and the investor defendants. At issue was the way the plaintiff had handled pretrial discovery, especially after July, 1977, when the SEC released the results of its investigation and revealed that it had found no misconduct on the part of the defendants. On appeal to the Second Circuit in 1983, the decision of the district court was affirmed.[59] The court held:

> We uphold the District Court because its finding of bad faith *continuation* of this lawsuit is well supported by the particular circumstances of this record. We do not thereby create an easy test for the award of attorney's fees to a successful defendant.

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[55] *Advisory Comm. Note*, *supra* note 5.

[56] *Id.*

[57] *Id. See also* General Accident Insurance Co. of America v. Fidelity & Deposit Co. of Md., 598 F. Supp. 1223 (E.D. Pa. 1984), on the issue of reliance on another attorney.

[58] 94 F.R.D. 136.

[59] 704 F.2d 652.

> Plaintiffs who have a colorable basis for a claim and who act in good faith need not apprehend that defeat on the merits of their lawsuit will require them to pay their adversaries' legal fees. . . . In this case the pace of discovery was just one factor that contributed to the District Court's finding of bad faith. Far more important was the fact that Nemeroff and his attorneys chose to *keep* Abelson and the investor defendants in court without an adequate factual basis behind the case.[60]

The distinction between the first and second decisions in the circuit court is crucial: it is the difference between a bad faith basis for bringing the complaint in the first place and a bad faith continuation of the litigation (with specific pretrial practice abuses) over a period of years. It is important to note that the circuit court in the second appeal did not "reach the District Court's alternative holding that Nemeroff's attorney prosecuted the case in an intentionally dilatory fashion."[61] It seems that both decisions of the circuit court would stand under rule 11 as amended.[62]

B. Application of the Reasonable Inquiry Test

At this time, courts are just beginning to explore what is "reasonable inquiry" under amended rule 11. At this writing, the Supreme Court has discussed amended rule 11 in only one case, *Burnett v. Grattan*.[63] Affirming a Fourth Circuit Court of Appeals decision regarding the appropriate statute of limitations for this action, the Court recognized that preparation for civil litigation is considerably different from what is required of one seeking administrative remedies. Writing for the majority, Justice Marshall noted that the party (and his or her attorney) "must conduct enough investigation to draft pleadings that meet the requirements of the federal rules. . . . Although the pleading and amendment of pleadings rules in federal court are to be liberally construed, the administration of justice is not well-served by the filing of premature, hastily-drawn complaints."[64]

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[60]*Id.* at 660 (emphasis supplied).

[61]*Id.*

[62]The distinction between bringing a complaint without factual or legal basis and pursuing or multiplying the proceedings without legal or factual basis is one courts continue to make under rule 11. *See, e.g.*, Rogers v. Kroger, 586 F. Supp. 597 (S.D. Tex. 1984); Taylor v. Belger Cartage Service, Inc., 102 F.R.D. 172 (W.D. Mo. 1984); *In re* Perez, 43 Bankr. 530 (S.D. Tex. 1984); *In re* 1801 Restaurant, Inc., 40 Bankr. 455 (D. Md. 1984).

[63]104 S. Ct. 2924 (1984). The court made reference to rule 11 in U.S. v. Sells Engineering, Inc., 463 U.S. 418, 429-30 n.12 (1983), acknowledging that the pre-filing investigation and certification requirements of rule 11 may hamper the Department of Justice in bringing civil fraud claims, because the government attorneys are not likely to have personal knowledge of the facts of a case prior to the discovery process.

[64]104 S. Ct. at 2930.

The opinion gives no further insight into what preparation is required or what is "enough" investigation other than to add that "the litigant must look ahead to the responsibilities that immediately follow the filing of a complaint. The litigant must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery."[65] A litigant must also be prepared to withstand a rule 11 challenge to the appropriateness and sufficiency of his or her pleading prior to trial.[66]

As yet, no definitive statements of what constitutes "reasonable inquiry" into the facts or the law have emerged in either the circuit or district courts. These courts are beginning to acknowledge that there are differences between the "good ground" subjective test and the new "reasonable inquiry" test.[67] In *Wells v. Oppenheimer*, the defendants were warned during a pretrial conference that a motion for summary judgment would be a "waste of time, should be discouraged, [and that the court would be] generous in awarding counsel fees to parties who successfully opposed such motions."[68] When defendants proceeded to bring their motion, the court found it "futile." While acknowledging that the attorneys acted in "subjective good faith" in bringing the motion, the court ruled there was no *objective* basis in law or fact for the motion and thus found the attorneys in violation of rule 11.[69] The court deferred its decision on the amount of fees to be awarded until after a final determination of the case, because it believed "litigation on this point at this time would frustrate the goal of judicial economy and could have an ill effect on settlement possibilities."[70]

Under the "good ground" test, a pleading not supported by the subjective good faith of an attorney, that is, one that was frivolous or brought vexatiously or with the intent of multiplying the proceedings,[71] could be challenged whether or not later steps in the litigation revealed the matter to be true or false in terms of underlying facts and law.[72] In fact, this rarely happened under the 1938 rule 11, *Freeman v. Kirby* being the notable exception. Courts have been reluctant to challenge a

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[65]*Id.*

[66]Rule 11 inquiries may be conducted at a discovery conference under rule 26(f). Del Valle v. Taylor, 587 F. Supp. 514 (D.N.D. 1984).

[67]Zaldivar v. City of Los Angeles, 590 F. Supp. 852, 856-57 (C.D. Cal. 1984), provides an excellent comparison of the two tests.

[68]101 F.R.D. 358, 359 (S.D.N.Y. 1984). *See also* SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555 (N.D. Ill. 1984) (citing *Wells v. Oppenheimer* and further distinguishing the bad faith test from the amended rule 11 test).

[69]101 F.R.D. at 359.

[70]*Id.*

[71]This is the "bad faith" test of Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166 (7th Cir. 1983), under original rule 11 and the test for 28 U.S.C. § 1927 as explained in Overnite Transportation Co. v. Chicago Industrial Tire Co., 697 F.2d 789, 794 (7th Cir. 1983).

[72]*Cf. Freeman v. Kirby* and *Murchinson v. Kirby*, where the same facts resulted in opposite rulings on whether a rule 11 violation had occurred.

pleading on the basis of an attorney's bad faith where the underlying falsity or frivolity of the pleading was not apparent.[73]

Under the objective test of amended rule 11, regardless of the attorney's honest belief that the pleading is well founded in law and fact, the pleading may be challenged. This does not mean, however, that the losing party will be subject to rule 11 sanctions, where at least colorable argument has been made.[74]

C. Delay and Improper Purposes in Pleading

In *Nemeroff*, the Second Circuit Court of Appeals felt that holding a party to the good ground test "would promote the abortion of many potentially meritorious claims."[75] This criticism was raised by the American College of Trial Lawyers, who noted:

> The proposed rules provide the right to sanction a lawyer who proceeds in good faith upon information obtained from his client if the judge concludes that under the circumstances additional inquiry should have been made. This concern is increased when one considers that the requirement for willfulness has been deleted by the proposed amendments to Rule 11 and that the Advisory Committee expressly states that sanctions should be imposed if the principal effect of the pleading is unreasonable delay, even if there is another legitimate purpose for the pleading.[76]

Under the new rule 11, the effect of a party's motion or pleading on the litigation process becomes the measure of its judicial appropriateness, not its result in terms of adjudication on the merits of the dispute. Some avenues of litigation may be necessarily foreclosed as a result.[77] For example, in a 1983 case under the original rule 11 in which an alien sought review of an Immigration and Naturalization Service (INS) order of deportation, the District Court for the Western District of Missouri noted that the appeal of the INS order accomplished the desired delay. The court presumed the appeal was taken in good faith

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[73]Heart Disease Research Found. v. General Motors Corp., 15 Fed. R. Serv. 2d 1517, 1519 (S.D.N.Y. 1972), *cited in the Advisory Comm. Note*, *supra* note 5.

[74]Ring v. R.J. Reynolds Industries, Inc., 597 F. Supp. 1277 (N.D. Ill. 1984); Ank Shipping Co. v. Seychelles Nat'l Commodity Co. Ltd., 596 F. Supp. 1455 (S.D.N.Y. 1984).

[75]620 F.2d at 349.

[76]*Am. College of Trial Lawyers Comments*, *supra* note 2.

[77]Tax protest cases have resulted in rule 11 sanctions on plaintiffs and their attorneys in many courts. *See, e.g.*, Parker v. Commissioner of Internal Revenue, 724 F.2d 469 (5th Cir. 1984); Granzow v. Commissioner of Internal Revenue, 739 F.2d 265 (7th Cir. 1984); United States v. Hart, 701 F.2d 749 (8th Cir. 1983); McCoy v. Commissioner of Internal Revenue, 696 F.2d 1234 (9th Cir. 1983). In Blair v. U.S. Treasury Dept., 596 F. Supp. 273, 282 (N.D. Ind. 1984), the court notes a valid tax dispute will not result in sanctions under rule 11 even where the taxpayer loses on every issue.

under rule 11 and allowed the suit to go forward.[78] Amended rule 11 makes the issue of good faith irrelevant. It requires the judge to look at the result of a motion regardless of the party's intent in making the motion. Under amended rule 11, the procedural result in this and similar INS actions would probably be different.[79]

The requirement that a pleading, motion, or other paper not be "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," originally required that the pleading not be "primarily interposed" for such a purpose.[80] The Advisory Committee Note explains the word "primarily" was removed to eliminate ambiguity. The result is that the rule forecloses pleadings and motions which may result in delay and increased cost even where a legitimate trial tactic or client interest may be involved. For example, while no decisions have yet dealt directly with this facet of rule 11, critics of the rule recognized that this clause may allow the judge to second-guess the attorney.[81] Words such as "unnecessary delay" and "needless cost" are highly subjective. What is "unnecessary" and "needless" from the judge's perspective may not appear so to the client whose interest is being litigated.

D. Inquiry Into Facts

Few cases involving reasonable inquiry into questions of fact have surfaced under amended rule 11.[82] In *Van Berkel v. Fox Farm and Road Machinery*, the plaintiff's attorney was sanctioned under amended rule 11 where a products liability claim was brought and not voluntarily dismissed when it became evident the six-year statute of limitations barred

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[78]Carrette-Michel v. I.N.S., 575 F. Supp. 150 (W.D. Mo. 1983), *rev'd*, 749 F.2d 490 (8th Cir. 1984).

[79]In reversing and remanding the district court's order denying a suspension of the deportation order for Carrette-Michel, the appellate court made no note of the rule 11 issue. The reversal was made on the basis of new evidence in the case.

[80]*Advisory Comm. Note*, *supra* note 5.

[81]*Am. College of Trial Lawyers Comments*, *supra* note 2. After protracted litigation, the Seventh Circuit Court of Appeals noted in *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, that it would be pointless "to divide a suitor's claims or defenses into frivolous and nonfrivolous" ones. Although this decision reversed a lower court rule 11 sanction for that reason, such a result cannot be predicted in all cases, especially where alternative pleadings are used. 739 F.2d 1159, 1168 (1984).

[82]Amended rule 11 requires inquiry into both fact and law. It is not enough that some facts exist to support a party's claim. Those facts must support the specific legal claims being made. In a labor dispute case, the District Court for the Northern District of California found a rule 11 violation resulting in an award of attorney's fees of $6,125 based on that distinction. WSB Electric Co., Inc. v. Rank and File Committee to Stop the 2-Gate System, 103 F.R.D. 417 (1984).

Certain pleadings may require higher levels of specificity and more extensive investigation of both fact and law to survive pretrial rule 11 challenges. *See, e.g.*, Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985), involving questions of tort immunity for public officials.

the claim.[83] The plaintiff had lost his right arm in a corn chopper manufactured, sold, and distributed by the defendant. The plaintiff engaged attorney Schmidt sometime in 1979 and told Schmidt the accident had occurred on September 6, 1977. Schmidt filed suit on September 2, 1983. The defendants answered on October 7, 1983, raising the statute of limitations, among other defenses. After several months Schmidt responded to the defendant's request for discovery of the plaintiff's medical records. When those records confirmed that the accident had occurred on September 6, 1976, the defendant's attorney made repeated requests to Schmidt to dismiss the suit voluntarily.

After a summary judgment was granted for the defendant, the defendant moved for costs and fees under rule 11. Schmidt offered a personal affidavit that he had acted in good faith in believing the date his client had given him and that he believed his client had also acted in good faith. His pre-filing inquiry involved investigation of the corn chopper machine but did not include obtaining the plaintiff's medical records. Under the circumstances, it may not have been unreasonable for Schmidt to believe his client recalled correctly the day his right arm had been severed. Had Schmidt filed suit promptly on the basis of his client's statement, the defendant's rule 11 motion might not have been successful. However, given the length of time Schmidt had between the time of engagement and the time of filing, there appears to be no reason why Schmidt should not have obtained his client's medical records or newspaper clippings of the accident. Because Schmidt's refusal to dismiss the suit voluntarily was not based on any legitimate concern for his client, the court felt no compunction in imposing a sanction on Schmidt personally.

One commentator has suggested that under the new rules, an attorney may never again rely on a client for factual information.[84] While such a conclusion probably goes too far, a seed of doubt has been sown in the attorney-client relationship. Whether that seed takes root depends on the circumstances surrounding the particular attorney-client relationship. Those particular circumstances will also determine the degree to which the attorney may rely on statements by the client in lieu of conducting his or her own investigations.

E. Inquiry Into the Law

In contrast to the infrequent litigation involving original rule 11,[85] the question of reasonable inquiry into the law under amended rule 11

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[83]581 F. Supp. 1248 (D. Minn. 1984).

[84]Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments of the Federal Rules of Civil Procedure*, 66 JUDICATURE 363 (1983).

[85]Nussbaum and Fenton, *1983 Amendments to Rules 7(b), 11, 26(g) of the Federal Rules of Civil Procedure: Description and Analysis*, Commments at the Business and Law Conference, Chicago, Oct. 11-13, 1983, *reprinted in* P. ROTHSTEIN, THE NEW AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 118, 127 (1983).

has already been the source of considerable litigation.[86] As amended, rule 11 requires an attorney to ensure that the pleading or motion is "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[87]

A few of these cases involve insufficient preparation by attorneys, including the failure to cite long-standing authority on a subject,[88] failure to file a memorandum of law when presenting a motion to dismiss,[89] or failure to demonstrate adequate legal grounds for the action, even after being given leave to amend the complaint.[90] The suits that are clearly frivolous pose little problem.[91] A number of procedural devices are available to dispose of the litigation and to sanction the attorneys and/or the parties responsible. Two areas of the law have raised more difficult rule 11 issues: personal jurisdiction and claims under the Racketeering Influenced and Corrupt Organizations Act (RICO).

Personal jurisdiction was termed a "difficult area of the law" by the District Court for the Southern District of New York, which held there was no rule 11 violation in bringing an action, even where jurisdiction over the defendant was not ultimately established.[92] District courts

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[86]*See supra* notes 27 and 34.

[87]97 F.R.D. 165, 167; *see also* Appendix.

[88]Booker v. City of Atlanta, 586 F. Supp. 340 (N.D. Ga. 1984).

[89]Lucha v. Goeglein, 575 F. Supp. 785 (E.D. Mo. 1983).

[90]Rubin v. Long Island Lighting Co. 576 F. Supp. 608 (S.D.N.Y. 1984).

[91]In *Aune v. United States*, the district court in Arizona noted that while taxpayers challenging the I.R.S. could have "filed their suit with impunity before August 1, 1983," now the suit resulted in a show cause order as to why the plaintiffs should not be required to pay the I.R.S.'s attorney's fees for defending a frivolous action. 582 F. Supp. 1132 (1984). In another taxpayer case, the telephone company questioned whether it should be compelled to obey a summons in a taxpayer's frivolous claim against the I.R.S. U.S. v. New England Telephone and Telegraph Co., 575 F. Supp. 138 (D.R.I. 1983). *See also* Frederick v. Clark, 587 F. Supp. 789 (W.D. Wisc. 1984), resulting in an award of attorney's fees to the I.R.S. under rule 11, and Sunn v. Dean, 597 F. Supp. 79 (N.D. Ga. 1984), where a losing party sued the jury from his previous trial.

Truly frivolous and vexatious actions should not be brought and the attorney does have a professional responsibility to refuse such cases under the ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) and ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.1. Richardson, *"Unconscionable Litigation" and the Attorney*, 3 J. LEGAL PROF. 153 (1978). The difficulty is that there is no clear test for deciding what is a meritless case. Where a plaintiff's claim was "destined to fail" but not made in bad faith no rule 11 sanction was imposed. Williams v. Birzon, 576 F. Supp. 577 (W.D.N.Y. 1983). In a suit filed in hopes of inducing financial gain through settlement rather than in the interest of pursuing the legal claims made, no rule 11 sanctions were granted. Gieringer v. Silverman, 731 F.2d 1272 (7th Cir. 1984). Although there was no objective basis for the suit in *Williams* and neither objective nor subjective merit for the suit in *Gieringer*, no sanctions resulted.

[92]Leema Enterprises Inc. v. Willi, 582 F. Supp. 255 (S.D.N.Y. 1984). *But cf.* Laborers Health and Welfare Trust Fund v. Hess, 594 F. Supp. 273 (N.D. Cal. 1984), where the defendant's request for rule 11 sanctions was termed frivolous and the plaintiff's novel arguments for an extension of ERISA jurisdiction were not; Hasty v. Paccar, Inc., 583 F. Supp 1577 (E.D. Mo. 1984), where jurisdiction was clearly not established and a rule 11 violation was found; *In re* Oximetrix, 748 F.2d 637 (D.C. Cir. 1984), where a similar result was reached.

in Michigan[93] and Indiana[94] have suggested that the timing of a jurisdictional challenge has a bearing on whether rule 11 has been violated.

In *Rubin v. Buckman*, the Third Circuit Court of Appeals remanded a case to determine whether a claim of diversity jurisdiction had been made in bad faith, before an award of attorney's fees could be made under rule 11.[95] *Rubin v. Buckman*, two other cases involving claims under the RICO Act,[96] and a case involving a petition to quash an IRS summons[97] all applied a subjective test to the attorney's actions and refused to impose sanctions under rule 11. In *Pudlo v. IRS*, the District Court for the Eastern District of Illinois noted that the attorneys had misread relevant sections of the IRS Code but that the misreading was not "unreasonable" under the circumstances. The court went on to say, however, "As the courts' interpretation of that section becomes more familiar to attorneys practicing in the field, even one-day late filings will likely become more suspect."[98]

Not only will the standards for what is reasonable inquiry into the law vary with the area of substantive law involved, but the experience and knowledge of the attorney may also be a factor.[99] Attorneys are left with few clear guidelines regarding what constitutes sufficient inquiry into the law to justify a pleading or motion without invoking rule 11. The Advisory Committee Note says only that the intent of the rule is not to "chill an attorney's enthusiasm or creativity."[100] It is not clear whether reasonable inquiry is to be determined by the amount of inquiry into the law or by a qualitative inquiry sufficient to give the attorney a good faith belief the client will prevail.

In holding that the plaintiff's attorney did not violate rule 11 even though the claim could have no "useful . . . outcome" in terms of ultimate determination and that there "was no genuine issue of material fact" to be tried, the court in *Folak v. Sheriff's Office of Cook County*[101] refused to impute bad faith to the plaintiff's attorney who had filed the complaint. Although the complaint was based on an untenable interpretation of the law, the court found that it is the honest belief

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[93]Sheet Metal Workers Int'l Ass'n v. Wer-Coy Fabrication Co., Inc., 578 F. Supp. 296 (E.D. Mich. 1984).

[94]Gonzales v. Union Carbide Corp., 580 F. Supp. 249 (N.D. Ind. 1983).

[95]727 F.2d 71, 73 (3rd Cir. 1984).

[96]Laterza v. Am. Broadcasting Co., Inc. 581 F. Supp. 408 (S.D.N.Y. 1984); Hudson v. LaRouche, 597 F. Supp. 623 (S.D.N.Y. 1983).

[97]Pudlo v. Director, I.R.S., 587 F. Supp. 1010 (N.D. Ill. 1984).

[98]*Id.* at 1012.

[99]Huetting and Schromm Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984).

[100]*Advisory Comm. Note*, *supra* note 5. Substantial attorney's fees were awarded as rule 11 sanctions in *Taylor v. Prudential Bache Securities, Inc.*, wherein the court voices "great reluctance in rendering such awards in light of the attendant potentially chilling effect." 594 F. Supp. 226, 229 (N.D.N.Y. 1984).

[101]579 F. Supp. 1338 (N.D. Ill. 1984).

of the attorney that the case *might* be established at the time of filing that is determinative, not the ultimate merit of the case.

One recent decision illustrates a different approach to arguments for extension of existing law under rule 11. In a Fourth Circuit Court of Appeals decision, the court refused to reverse a lower court decision not to impose a rule 11 sanction on an attorney who could cite no supporting authority for his argument that broad statutory interpretation supported his client's case.[102]

Conversely, in *Golden Eagle Distributing Co. v. Burroughs Corp.*,[103] although the defendants had submitted "an excellent brief" in support of their argument for an extension of the law regarding a conflicts of laws and statute of limitations problem, rule 11 sanctions were imposed. The defendant's original memorandum to the court and its brief filed in response to the plaintiff's motion for rule 11 sanctions were not based on the same arguments.[104] The result in this case illustrates how the ultimate decision on the merits of the claims involved may not coincide with the outcome of rule 11 motions.

While amended rule 11 purports to apply an objective test for what is reasonable inquiry, the courts are faced with a very narrow interpretation of reasonableness on a case-by-case basis. Courts will probably be more willing to impose sanctions on attorneys whose inquiry into the law is insufficient.[105] On the other hand, attorneys who rely on forwarding counsel[106] or on statements by the client when facts are in question[107] will probably be treated more leniently. Questions of subjective bad faith are still relevant where interpretation of the law is involved and where the motive for filing a pleading, motion, or paper may be questioned. In both the wording of rule 11 and in the Advisory Committee Note, ambiguous terms such as "good faith argument," "improper

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[102]Nelson v. Piedmont Aviation, Inc., 720 F.2d 1234 (1984). *See also In re* Morrell, 42 Bankr. 973 (Cal. 1984), which involved a similar outcome where the question of law was one of first impression for California courts.

[103]103 F.R.D. 124, 125 (N.D. Cal. 1984).

[104]Defendants were sanctioned not only for misleading the court as to the status of existing law in their original brief, but also for failing to cite contrary authority. *Id.* at 129.

[105]Ring v. R.J. Reynolds Industries, Inc., 597 F. Supp. 1277 (N.D. Ill. 1984). *See also* notes 149-51 and accompanying text.

[106]General Accident Insurance Co. of America v. Fidelity and Deposit Co. of Md., 598 F. Supp. 1223 (E.D. Pa. 1984), where the defendant as third-party plaintiff was not subject to rule 11 sanctions because it did not rely solely on information contained in the original complaint. *See also* Colucci v. N.Y. Times Co., 533 F. Supp. 1011 (S.D.N.Y. 1982), as an example where no sanctions were imposed for discovery abuse where an attorney relied on predecessor counsel.

[107]Van Berkel v. Fox Farm and Road Machinery, 581 F. Supp.. 1248 (D. Minn. 1984), did not involve a valid question of fact. The matter at issue was not on what date the accident did occur, but at what point in the litigation process the plaintiff's attorney determined the correct date of the accident, and whether he responded appropriately when he discovered that the date his client had given him did not correspond to the date of the medical records.

purpose," and "plausible interpretation" imply a subjective standard.[108] Whether a subjective or objective standard should be applied could be difficult to decide in mixed questions of law and fact.

It seems that rule 11 has moved pleadings far beyond a plain and simple claim for relief. The judge or other party may now challenge the very filing of any motion, paper, or pleading. Not only must an attorney be prepared to face the challenges of discovery, rule 12 motions to dismiss, and motions for summary judgment, but also the very act of filing can be challenged. Furthermore, courts and parties are not hesitating to bring rule 11 challenges.[109] Under rule 11 an attorney must now be prepared to prove in court that sufficient and reasonable inquiry was conducted before suit was brought.

F. Rule 11 Inquiry is Not a Substitute for Discovery

Shortly before rule 11 was amended, the Ninth Circuit Court of Appeals stated clearly that rule 11 was "not a discovery device."[110] In holding a lower court's requirement that plaintiffs produce rule 11 certifications to show there was "good ground" to support their pleadings was in error, the court said rule 11 "is not to be used to require plaintiff to offer proof of his case through supplemented Rule 11 certificates before discovery and before trial."[111] Citing Wright and Miller, the court agreed that such a practice "exposes the plaintiff to the risk of adverse judgment without the safeguards of Rule 56."[112] A rule 56 motion for summary judgment requires that all inferences be made in favor of the non-moving party and that the entire record be reviewed in determining whether there are any issues of fact in controversy.[113] Under a rule 11 motion these safeguards do not exist. A case could be dismissed where the pleading was not based on adequate pretrial investigation, notwithstanding the existence of genuine issues of fact and law.

In an Eleventh Circuit Court of Appeals case, rule 11 as amended was used in an attempt to forestall discovery and terminate the suit at the pleading stage.[114] The plaintiff, a doctor, claimed violation of various federal and state laws when he was denied staff privileges at a local hospital. He sought a temporary restraining order to halt the hospital's interference with his medical practice. The case was dismissed by the

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[108]97 F.R.D. 165, 167; *Advisory Comm. Note* , *supra* note 5; *see also* Appendix.

[109]*See supra* note 35. Courts are also raising rule 11 *sua sponte*, as in Envirotech Corp. v. Bethlehem Steel Corp., 729 F.2d 70, 77 (2d Cir. 1984), and in Hasty v. Paccar Inc., 583 F. Supp. 1577 (E.D. Mo. 1984).

[110]Chippano v. Champion Int'l Corp., 702 F.2d 827, 831 (9th Cir. 1983).

[111]*Id. See also* Lau Ah Yew v. Dulles, 236 F.2d 415, 416 (9th Cir. 1956), and Risinger, *supra* note 12.

[112]5 C. WRIGHT AND A. MILLER, *supra* note 8, § 1333; *see also* United States v. Price, 577 F. Supp. 1103 (D.N.J. 1984), and Dravo Corp. v. Ohio Power Co., 100 F.R.D. 307 (N.D. Ohio 1983), holding rule 11 is not a discovery device.

[113]5 C. WRIGHT AND A. MILLER, *supra* note 8.

[114]Majd-Pour v. Georgiana Community Hospital, Inc., 724 F.2d 901 (11th Cir. 1984).

district court for lack of subject matter jurisdiction at the hearing for the temporary restraining order. The plaintiff argued at the hearing that jurisdiction could be established with discovery.

In reversing the lower court's dismissal, the Eleventh Circuit court held that it was abuse of the court's discretionary powers to dismiss without allowing discovery on the question of jurisdiction.[115] In noting rule 11 and how ill-prepared the attorney was for the hearing, the circuit court held that the district court could limit the scope of discovery and deal with the jurisdiction question with appropriate motion procedure.[116]

Although discussion of rule 26(g) is beyond the scope of this Note, discovery motions are within the ambit of rule 11.[117] If rule 11 motions challenging the legal and factual sufficiency of pleadings are allowed but the case goes forward into the discovery stage, a question of judicial economy arises. No legitimate purpose is served by turning a rule 11 proceeding into a mini-trial on the pleadings.[118]

IV. Attorney-Client Relationship Under Rule 11

Whether a rule 11 challenge occurs at the pleading stage or later, rule 11 can compel the disclosure of information usually protected by the attorney-client privilege or by work product immunity. The Advisory Committee Note states that such disclosure is not required, but that *in camera* inspection of privileged or work product material may be necessary.[119] Rule 11 challenges may force an attorney to divulge trial strategy in an untimely manner, thereby having a prejudicial effect on the client's interest. Being forced to reveal preliminary investigative steps taken by the attorney and the contents of discussions with the client or witnesses could result in exposing case theories and strategies the attorney would prefer not be revealed until later, either in the interest of obtaining a more favorable settlement or in the interest of trial tactics.

In practical terms, rule 11 requires attorneys filing papers before a court "to memorialize in their files any additional aspects of their factual and legal investigation at the time."[120] Without an adequate record of the investigation, the sources of material factual allegations, and the

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[115]*Id.* at 903.

[116]*Id.*

[117]702 F.2d 827. *In re* Dayco Corp. Derivative Securities Litigation, 102 F.R.D. 468, 471 (S.D. Ohio 1984), makes clear that discovery and pleadings are still distinct processes, and that discovery may proceed while pleadings are being amended subject to a rule 11 challenge.

[118]Rule 11 inquiries may be conducted at a discovery conference under rule 26(f) and may result in an amended complaint, judgment on the pleadings, or summary judgment. Del Valle v. Taylor, 587 F. Supp. 514 (D.N.D. 1984).

[119]*Advisory Comm. Note, supra* note 5.

[120]Sussman and Sussman, *Overview of the 1983 Amendments to the Federal Rules of Civil Procedure, reprinted in* J. Rothstein, *supra* note 70, at 1, 13.

legal underpinnings of the case, it may be difficult to reconstruct later the rationale for proceeding.[121]

A second practical consideration may be to inform the client of these rules, the possibility of needing to disclose "confidential" information, and the possibility of sanctions. So informing a client may have a "chilling" effect on the attorney-client relationship. It may lead the client to withhold information in order to "protect" the attorney.

The American College of Trial Lawyers pointed out that these new rules may create situations where attorneys face a choice between client loyalty and confidentiality, and sanctions by the court.[122] Because the attorney-client privilege belongs to the *client* and not to the attorney, the attorney may in fact have no choice but to divulge information in order to show that reasonable pre-filing or pre-motion investigation was conducted without exposing herself or himself to malpractice claims by the client.[123]

The American Bar Association (ABA) Model Rules of Professional Conduct at 1.6(b)(2) permit an attorney to divulge confidential information when necessary to defend against a civil claim in which the client's conduct was involved or to respond to allegations concerning the attorney's representation of the client. However, DR 4-101(C) of the ABA Code of Professional Responsibility gives broader authority to the attorney to breach the client's confidences or secrets whenever necessary to defend himself against an accusation of wrongful conduct. The fact that an attorney may not be subject to disciplinary proceedings for complying with the requirements of rule 11 is comforting, but does not negate the fact that proceedings can be multiplied, involving greater cost and more time for all parties, and that the strength of the fiduciary relationship between attorney and client may be severely tested as a result.[124] When rule 11 challenges are raised, it seems likely that both the client and the attorney will find their energies diverted from the underlying matter in dispute and may themselves end up as adversaries.

The amendments to the Federal Rules of Civil Procedure, especially rule 11,[125] alter the relationship between attorney and client by forcing the attorney to weigh at every step of the litigation not only what is in the best interests of the client, but what possible sanctions on the attorney personally may result and how the step being considered can

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[121]*Id.*

[122]*Am. College of Trial Lawyers Comments, supra* note 2.

[123]*Id.*

[124]Textor v. Bd. of Regents of Northern Ill. Univ., 711 F.2d 1387 (5th Cir. 1983), holding that where a rule 11 violation was raised, due process requirements must be observed before sanctions can be imposed on attorneys. *But see* Rodgers v. Lincoln Towing Service, Inc., 596 F. Supp. 13 (N.D. Ill. 1984), holding that a hearing is not necessary where a rule 11 sanction is applied as a matter of law and no factual issues of the attorney's bad faith are involved.

[125]Rules 7(b) and 26(g) are substantially the same as rule 11 and therefore have a similar effect. *See* Appendix to this Note.

be justified and legitimized to the judge. While it is not a bad result to force attorneys to weigh the benefits and outcomes of their actions, it is not in the best interests of an adversary system of justice to force attorneys to value their own interests or their adversary's interests over their client's interests. While some commentators have considered the dilemma the rules create for attorneys and feel these rule changes will deter dilatory practices,[126] others suggest that it is unfair to expect the attorney to balance conflicting loyalties.[127]

By extending the attorney's ethical duty to the judicial system not to represent a client in a groundless case[128] to every pleading, motion, and paper filed in litigation, rule 11 denigrates the attorney's duty to represent her or his client zealously.[129] It places every attorney, and ultimately the judge, in the position of deciding the case on procedural grounds, before and perhaps without ever reaching the merits of the case.

V. Sanctions

It has been noted that federal judges have a broad range of sanctions available when a litigant acts in bad faith or in some way manipulates the judicial process to make the outcome unjust, delayed, or excessively expensive.[130] Nevertheless, judges have been reluctant to impose sanctions on attorneys, either because the standards for violation are unclear or because they are reluctant to impute bad faith or to find that attorneys acted willfully.[131]

The reluctance of judges to use their inherent power to impose sanctions[132] or to impose sanctions under the federal rules[133] or 28 U.S.C. § 1927[134] may also be due to concern as to who is actually being punished by such actions: the attorney, the client, or even the clients on both

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[126]Buckley, *Deterring Dilatory Tactics in Litigation: Proposed Amendments to Rules 7 and 11 of the Federal Rules of Civil Procedure*, 26 St. Louis U. L.J. 895, 910 (1982).

[127]Thode, *The Groundless Case—The Lawyer's Tort Duty to his Client and to the Adverse Party*, 11 St. Mary's L.J. 59 (1979).

[128]This duty is also encompassed in ABA Code of Professional Responsibility DR 7-102(A)(1), and Model Rules of Professional Conduct 3.1, but the standards for applying these requirements are no clearer than those for rule 11.

[129]ABA Code of Professional Responsibility Canon 7.

[130]R. Rodes and R. Kipple, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure, A Report to the Federal Judicial Center* (1981); Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Calif. L. Rev. 264 (1979); Edelstein, *The Ethics of Dilatory Motion Practice: Time for a Change*, 44 Fordham L. Rev. 1069 (1976).

[131]*Id.*

[132]Rodes and Kipple, *supra* note 130.

[133]*See* Roadway Express v. Piper, 447 U.S. at 765.

[134]28 U.S.C. § 1927 (1983) empowers courts to require "[a]ny attorney or other person admitted to conduct cases in any court in the United States or any Territory thereof who so multiplies the proceeding in any case unreasonably and vexatiously . . . to satisfy personally such excess costs."

sides of the litigation.[135] The Advisory Committee was cognizant of these concerns and made specific provision for mandatory sanctions to be imposed personally on the responsible attorney where appropriate.[136]

Critics of these sanction provisions point out that because sanctions, although "mandatory," are to be "appropriate,"[137] many of the problems of judicial reluctance and unclear standards have not been corrected.[138] The imposition of appropriate sanctions for violations of rule 11 is even more fact-sensitive than application of the "reasonable inquiry" test. Cases decided in the district and appellate courts give attorneys little guidance as to what is an "appropriate" sanction.[139] For example, in a case where pleading alternate citizenship was found to be a "flagrant violation" of rule 11, the court awarded no sanctions.[140] In another case, a "nonmeritorious" claim based on "very scanty" evidence was held not to be a rule 11 violation and no sanctions were imposed.[141] In close cases, courts may simply find no violation existed and so no sanction is warranted.[142] Other cases tend to look to the attorney's bad faith before imposing a sanction, even where the initial finding of violation was based on an objective standard.[143]

The Advisory Committee Note explains that rule 11 sanctions are to be seen as "expanding on the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith. . . ."[144] The Committee notes further that rule 11 sanctions now emphasize a "deterrent orientation," bringing them in line with the approach for discovery sanctions.[145] Parties, their attorneys,

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[135]Renfrew, *supra* note 130 at 273.

[136]*Advisory Comm. Note*, *supra* note 5.

[137]*Id.*

[138]Sussman and Sussman, *supra* note 120, at 22; *Am. College of Trial Lawyers Comments*, *supra* note 2.

[139]*Day v. Amoco Chemicals Corp.* lists twelve factors to be considered in awarding attorney's fees under rule 11, 28 U.S.C. § 1927, or the inherent powers of the court. 595 F. Supp. 1120, 1123 n.2 (S.D. Tex. 1984). These factors were rejected as a basis for fee determination in *Zaldivar v. City of Los Angeles*, which suggested that no clear consensus on how fees should be determined has emerged. 590 F. Supp. 852 (C.D. Cal. 1984).

[140]Rubin v. Buckman, 727 F.2d 71 (3rd Cir. 1984).

[141]Victory Beauty Supply, Inc. v. LaMaur, 98 F.R.D. 306 (N.D. Ill. 1983).

[142]Gold v. Blinder Robinson Co., 580 F. Supp. 50, 55 (S.D.N.Y. 1984); *but cf.*, McHan v. Grandbouche, 99 F.R.D. 260, 267 (D. Kan. 1983), warning that courts will act differently under amended rule 11.

[143]Weisman v. Rivlin, 598 F. Supp. 724 (D.D.C. 1984); Dahlberg v. Becker, 581 F. Supp. 855 (N.D.N.Y. 1984), *aff'd*, 748 F.2d 85 (2d Cir. 1984); Williams v. Birzon, 576 F. Supp. 577 (W.D.N.Y. 1983).

[144]*Advisory Comm. Note, supra note 5; see also* Roadway Express v. Piper, 447 U.S. 752 (1980); Hall v. Cole, 412 U.S. 1 (1973). In *Taylor v. Prudential Bache Securities, Inc.*, the court suggested a dual purpose for rule 11 sanctions: to compensate victims and to discourage frivolous litigation. 594 F. Supp. 226 (N.D.N.Y. 1984).

[145]*Advisory Comm. Note*, *supra* note 5; *see also* Nat'l Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976). This deterrent function does not yet go so far as to allow punitive damages. *In re* Itel Securities Litigation, 596 F. Supp. 226, 235 (N.D. Cal. 1984).

or parties and their attorneys jointly may be held liable for rule 11 sanctions. The majority of cases imposing rule 11 sanctions in the form of awards of attorney fees have imposed the sanction on the attorney upon whom the burden of "reasonable inquiry" rested.[146] A few cases have imposed sanctions on the client and attorney jointly.[147]

To the extent that rule 11 sanctions are seen as a way to shift the economic burden of litigation, concerns about extended litigation, satellite hearings, and challenges to the attorney-client relationship become acute. Requests for sanctions under rule 11 require notice to the court, and then presumably other papers must be filed and a hearing on the matter may be held. Although the Advisory Committee Note discourages such action,[148] it is likely that some discovery into the "reasonableness" of pre-filing inquiry will be necessary.[149] If the intent of rule 11 motions is to promote judicial economy by eliminating frivolous and unmerited actions, this goal will be achieved *only* to the extent it has a deterrent effect on other actions not yet filed. In the case where rule 11 challenges are raised, the litigation will be extended.[150] Even where the court is able to limit the scope of satellite proceedings, some additional cost and time are involved.

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[146]Dore v. Schultz, 582 F. Supp. 154 (S.D.N.Y. 1984); Wold v. Minerals Engineering Co., 575 F. Supp. 166 (D. Col. 1983), ordering attorneys personally to pay all costs and fees imposed under rule 11 sanctions. A party proceeding *pro se* may be held to the same standards as an attorney. *In re* 1801 Restaurant, Inc. 40 Bankr. 455 (D. Md. 1984).

[147]*See, e.g.*, Aune v. United States, 582 F. Supp. 1132 (D. Ariz. 1984), where sanctions were directed at the plaintiffs; Rubin v. Long Island Lighting Co., 620 F.2d at 349, where the plaintiff and her attorney were ordered to share the sanction; Steinberg v. St. Regis/ Sheraton Hotel, 583 F. Supp. 421 (S.D.N.Y. 1984), where the plaintiffs and their attorney were ordered to share the costs imposed for the defendant's attorney fees but the plaintiffs' share was reduced in light of the financial status of the plaintiffs.

[148]*Advisory Comm. Note, supra* note 5. It is not unlikely that the question of appropriate legal fees to be awarded will become a matter of dispute as it has in civil rights and in antitrust litigation. *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424 (1983); Jacquette v. Black Hawk County Iowa, 710 F.2d 455 (8th Cir. 1983); *In re* Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D. Pa. 1983).

[149]In granting sanctions under rule 11, the District Court for the District of Columbia noted that the request for attorney's fees must itself be reasonable. The reasonableness of the request may be determined in light of the time necessary to respond to an improper pleading, the causal link between the improper pleading and the request for sanctions, and the prior actions of the party requesting sanctions. Weisman v. Rivlin, 598 F. Supp. 724 (1984). The court may also use its discretion to reduce fee awards to avoid financial ruin of the sanctioned party or the party's attorney. Rogers v. Kroger Co., 586 F. Supp. 597, 601 (S.D. Tex. 1984).

[150]In *SFM Corp. v. Sundstrand Corp.*, the court urged the parties to reach an out-of-court settlement on the appropriate amount of rule 11 fees, but noted a hearing could be held later if the parties did not agree. 102 F.R.D. 555, 560 (N.D. Ill. 1984). A court may also reserve a decision on rule 11 sanctions, pending other actions by the parties. McLaughlin v. Bradlee, 599 F. Supp. 839 (D.D.C. 1984); McDonough v. Ney, 599 F. Supp. 679 (D. Me. 1984). *See also* Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223 (7th Cir. 1984), holding an award of attorney's fees under 28 U.S.C. § 1927 is an appealable collateral order.

Advisory Committee reporter Arthur Miller acknowledged the critics' concern about satellite litigation and the "cloning" or routine use of sanction motions under rule 11.[151] He expressed the opinion that there would be a "two- or three-year period of hyperactivity under some of these sanction provisions," but that judges will be able to curb this and handle sanctions "rapidly and very efficiently."[152] Another Committee member, Congressman Charles Wiggins, summarized the amendments under three headings: judicial activism, attorney accountability, and deterrence of noncompliance with the rules through sanctions.[153] The primary concerns behind these amendments are unnecessary delay and expense in litigation.

Because the federal judicial system is already highly efficient, with ninety-five percent of all civil cases settled before reaching trial,[154] the marginal utility of these amendments to rule 11 must be questioned. It can be assumed that the vast majority of cases brought before the courts are based on good faith and grounded objectively in fact and law. The system of plain and simple pleading and pretrial discovery propels most cases into out-of-court settlement before trial is necessary. However, there are those cases which still require their day in court. No amount of judicial rule-making or sanctions designed to have a deterrent effect will prevent such litigation.

These rule amendments not only increase the economic risk of litigation for the private citizen, which is especially burdensome to the poor and middle classes, but they also challenge the right to file a civil action. Even in a "litigious society," any measure designed to chill a party's or an attorney's willingness to file suit and prosecute it vigorously must be carefully weighed.

The right to bring a civil action is basic to our democratic and human values. This right is vital because it is the enforcement mechanism for all other civil rights. The private right to bring an action against another person or even against the state is the right to invoke the enforcement power of the state once a judgment is obtained. It is this right more than any other which distinguishes ours from a society where

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[151]Miller, *Proceedings of the Second Circuit Judicial Conference*, 101 F.R.D. 161, 200.

[152]*Id.*

[153]Wiggins, *Proceedings of the Second Circuit Judicial Conference*, 101 F.R.D. at 179.

[154]*Federal Judicial Workload Statistics During the Twelve-Month Period Ending December 31, 1983*, Administrative Office of the U.S. Courts, Statistical Analysis and Reports Div., at A-24 show that only 5.2% of all civil cases in all district courts ever reach trial:

Total civil cases, all district courts	224,745
Settled with no court action	105,241
Settled before pretrial	80,066
Settled during/after pretrial	27,748
Settled during/after trial	11,690

the rights of the state rather than the rights of individuals are paramount. It is a right upon which the courts should tread lightly.

VI. Conclusion

In 1938, the president of the American Bar Association suggested, "If wisely administered, the Rules should do much to eliminate the complaints of laymen and of lawyers alike as to the technicalities of the law, the subleties of practice, and the involvements of procedure. Their object must at all time control — 'to secure the just, speedy and inexpensive determination of every action.' "[155] By requiring pleadings to be "simple, concise and direct,"[156] but allowing for maximum disclosure of information between the parties before trial, the Federal Rules of Civil Procedure have advanced the cause of justice in an effective and efficient manner. Pleadings were not meant "to inform too much or too well";[157] they were "allegations, not facts."[158]

The 1983 amendments to these rules have now subjugated those achievements to the interest of more active case management by the judiciary and greater vigilance over the exercise of the civil right to bring a cause of action.[159] There is great difference between a procedural system which effectively advances the adversary system to promote resolution of actions on the basis of the merits of the facts and law in dispute and a procedural system which advances economy and efficiency at the expense of adjudication on the merits.

Judy L. Woods

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[155]Federal Rules of Civil Procedure and Proceedings of the Am. Bar Institute, at iv, (1938).

[156]*Id.*

[157]Shuchman, *The Question of a Lawyer's Deceit*, 53 Conn. B.J. 101, 107 (1979).

[158]*Id.*

[159]Harvey, *supra* note 7, at 21.

Appendix

FINAL DRAFT OF PROPOSED AMENDMENTS TO RULES 7(b), 11, AND 26(g) OF FEDERAL RULES OF CIVIL PROCEDURE

Rule 7. Pleadings Allowed; Form of Motions

* * *

(b) MOTIONS AND OTHER PAPERS

* * *

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) *All motions shall be signed in accordance with Rule 11.*

* * *

Rule 11. Signing of Pleadings, *Motions, and Other Papers; Sanctions*

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, *motion, or other paper* and state his address. Except when otherwise specifically provided by rule or statutes, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney *or party* constitutes a certificate by him that he knowledge, information, and belief ~~there is good ground to support it, and that it is not interposed for delay~~ *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.* If a pleading, *motion, or other paper* is not signed, *it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.* ~~or is signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.~~ *If a pleading is signed in violation of this rule, the court, upon motion*

or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

Rule 26. General Provisions Governing Discovery

* * *

(g) SIGNING OF DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

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